TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY, APPELLANT,

vs.

STATE HIGHWAY COMMISSION OF KANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

FILED SEPTEMBER 25, 1934.

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[fol. 1]

IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

RECITALS AS TO FILING OF PLEADINGS, ETC.

Be it remembered, that on the 15th day of January, A. D. 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for an Alternative Writ of Mandamus, herein, which Motion for Alternative Writ of Mandamus, appears at pages 3, 4, 5 and 6, of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 2] Be it remembered, that on the 15th day of January, 1934, an Alternative Writ of Mandamus was issued a copy of which Alternative Writ of Mandamus appears at pages 7 and 8 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 3] Be it further remembered, that on the 18th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Answer of the Defendant, a copy of which, appears at pages 9, 10, 11, 12, 13 and 14 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 4] Be it further remembered, that on the 24th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for Judgment, which Motion for Judgment appears at page 15 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 5] Be it further remembered, that afterward and on the 26th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Abstract prepared by the plaintiff herein, which Abstract is in the words and figures as follows to-wit:

[fol. 6] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF KANSAS, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

MOTION FOR AN ALTERNATIVE WRIT OF MANDAMUS

Comes now the State Highway Commission of Kansas and for its motion for an alternative writ of mandamus directed to Panhandle Eastern Pipe Line Company alleges and states:

1. That the State Highway Commission of Kansas, plaintiff herein, is a branch of the state government designated as a body corporate and created by chapter 225 of the Laws of 1929, and as such has authority to maintain this action; that plaintiff will be hereafter referred to as the "Highway Commission."

2. That the defendant, Panhandle Eastern Pipe Line Company, is a Delaware corporation, duly and regularly licensed and authorized to do business in the state of Kansas as a foreign corporation; that said defendant will be hereinafter referred to as the "Pipe Line Company."

3. That the Highway Commission has under its supervision and control the state system of highways and has the power and duty to designate, adopt and establish, to lay out, open, relocate, alter, vacate, redesignate, and reestablish highways in every county in the state as part and parcel of said state system of highways.

4. That the Pipe Line Company is engaged in the business of transporting natural gas by pipe line both in interstate and intrastate commerce; that for such purpose it owns, operates and maintains a system of pipe lines, tele-
[fol. 7] phone and telegraph lines; that several hundred miles of such lines are located within the boundaries of the state of Kansas and are located upon and over privately owned easements and on and across public roads and highways, upon and across navigable and nonnavigable streams and both private and public lands.

5. That the Highway Commission is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the state of Kansas, and for such purposes has secured the necessary rights of way for such improvements. That the proposed changes in said highways are necessary and in the interest of public safety and convenience and have been so determined by the formal action of the Highway Commission. That plans and specifications for such improvements have been adopted and approved by it and contracts let for the construction thereof. That at various points along said highways the rights of way so secured for such purposes cross and intersect privately owned rights of way of the Pipe Line Company which are being used and occupied by it for the purposes of its business. That it is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the Pipe Line Company be changed, lowered, encased or moved all in accordance with the plans and specifications adopted and approved by the Highway Commission for the completion of said highway improvement.

6. That the specific changes now required and necessary to be made in the lines of the Pipe Line Company, as aforesaid, together with the approximate locations thereof, and the general nature of the necessary changes are as follows, to wit:

(A) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective rights of way being in section 20, township 13 south, range 21 east, said point being located on newly acquired highway right of way.

(B) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 I; the point of intersection of the respective rights of way being located in the southeast quarter of section 8, township 19 south, range 17 east, on newly acquired highway right of way.

(C) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16 east, in Coffey county, Kansas,

where the pipe line crosses diagonally the present highway which is being widened forty feet by the acquisition of new right of way.

[fol. 8] (D) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective rights of way being in section 16, township 19 south, range 21 east, Franklin county, Kansas, on new highway right of way.

(E) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widening highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19 south, range 17 east, and sections 13, 14, 15 and 16, in township 19 south, range 16 east.

(F) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8, in Pratt county, Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13 west.

7. That the Pipe Line Company's estimates of the total cost of the various aforesaid changes are as follows, to wit:

A (above)	cost	$406.00
B	cost	1,169.00
C	cost	2,780.00
D	cost	400.00
E	cost	587.00
F	cost	118.00

8. That such relocation, removal or encasing of the lines of the Pipe Line Company, as aforesaid, may be done and accomplished by the Pipe Line Company without the purchase or condemnation of any other or different rights of way than those now occupied by it with its lines in their present location.

9. That the Highway Commission has ordered and directed said Pipe Line Company to make such changes in the location and design of its lines aforesaid, all as con-

templated and provided by R. S. 1931 Supp. 68-415, and has heretofore and on and before December 1, 1933, furnished said company with all necessary plans, specifications and information necessary to enable said Pipe Line Company to proceed to make, accomplish and perform all said changes required by the improvement of said state highways, but that said Pipe Line Company ever since has and now fails, neglects and refuses to conform therewith. That said Pipe Line Company specifically refuses to make such changes in its lines until the Highway Commission has entered into an obligation requiring it to pay the cost of all required material and labor and to indemnify it and pay for all damages inflicted or incurred in the performance of such work.

10. The Highway Commission further alleges that it can-
[fol. 9] not safely or efficiently perfom such necessary changes by any agency within its control, for the reason that the nature of Pipe Line Company's business is such that any such attempt would occasion severe danger and probable irreparable injury and damage to life and property. That it would be impractical for the Highway Commission to attempt to make such changes, and such work can only be accomplished efficiently and with reasonable safety by means acting under the direction and control of Pipe Line Company.

11. The Highway Commission alleges that all the rights of Pipe Line Company in the rights of way involved herein are servient and subject to the needs, demands and requirements of public safety. That the Pipe Line Company's failure and refusal to make the changes in its lines hereinabove specified in accordance with the orders and rulings and plans and specifications of the Highway Commission are without legal right or authority.

The Highway Commission further alleges that it is without any adequate remedy at law.

Now, therefore, the Highway Commission moves and prays this court for an alternative writ of mandamus herein ordering and directing the said Pipe Line Company to forthwith move, change, lower and encase its lines at the points hereinbefore stated in accordance with the orders, plans and specifications adopted and approved by the High-

way Commission or to show cause why the same should not be done. Plaintiff further prays that upon final hearing that the alternative writ be made peremptory.

Wint Smith, Otho W. Lomax.

Duly sworn to by Wint Smith. Jurat omitted in printing.

[fol. 10] IN SUPREME COURT OF KANSAS

ALTERNATIVE WRIT OF MANDAMUS

Whereas, on this 15 day of January, 1934, it appears that the State Highway Commission of Kansas has filed herein its verified motion for an alternative writ of mandamus, copy of which is hereto attached, and it appearing from the allegations and averments thereof that the construction and improvement of certain state highways is being hindered and delayed by the unlawful neglect and refusal of Panhandle Eastern Pipe Line Company to make certain changes in its lines in accordance with the orders, plans and specifications adopted and promulgated by the State Highway Commission of Kansas and which changes are required in the interests of public safety,

Now, therefore, Panhandle Eastern Pipe Line Company is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike manner the changes in its lines hereinafter specified in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission for the improvement of the highways therein referred to, or to show cause, on or before the 25 day of January, 1934, why the same should not be done.

(A) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective rights of ways being in section 20, township 13 south, range 21 east, said point being located on newly acquired highway right of way.

(B) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 I; the point of intersection

of the respective rights of way being located in the southeast quarter of section 8, township 19 south, range 17 east, on newly acquired highway right of way.

(C) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16 east, in Coffey county, Kansas, where the pipe line crosses diagonally the present highway, which is being widened forty feet by the acquisition of new right of way.

(D) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective rights of way being in section 16, township 19 south, range 21 east, Franklin county, Kansas, on new highway right of way.

(E) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widen-
[fol. 11] ing highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19 south, range 17 east, and sections 13, 14, 15 and 16 in township 19 south, range 16 east.

(F) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8, in Pratt county, Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13 west.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas. (Seal.)

Acknowledgment of Service

I hereby acknowledge service upon me this 16th day of January, 1934, of the original alternative writ of mandamus herein.

Panhandle Eastern Pipe Line Company, by G. J. Neuner, General Counsel.

[fol. 12] IN SUPREME COURT OF KANSAS

ANSWER OF DEFENDANT, PANHANDLE EASTERN PIPE LINE COMPANY

Comes now defendant, Panhandle Eastern Pipe Line Company, a corporation, and for its return to the alternative writ of mandamus issued herein on the 15th day of January, 1934, and by way of answer to plaintiff's motion for an alternative writ of mandamus and for cause and reasons for its noncompliance with the provisions of said alternative writ of mandamus, states that said writ should be vacated, set aside, and held for naught, and said plaintiff ought not to be granted its peremptory writ of mandamus herein for the reasons hereinafter state-:

1. Defendant denies all allegations in plaintiff's motion for an alternative writ of mandamus contained, except such as are herein specifically admitted, qualified or explained.

2. Defendant admits the corporate existence and status of plaintiff and defendant as set forth in paragraphs 1 and 2 of said motion.

3. Defendant admits the allegations of paragraph 3 of said motion with respect to the supervision, control, power and duty of plaintiff over highways in the state of Kansas.

4. Defendant admits the allegations of paragraph 4 of said motion with respect to the business of defendant and its ownership and operation of a system of pipe lines, telephone and telegraph lines, and alleges that the portion of defendant's pipe line referred to in said motion is used exclusively in interstate commerce.

5. Answering the allegations of paragraph 5 of said motion, defendant admits that plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the state of Kansas, and for such purposes has procured rights of way for such improvements from the land owners, but states that plaintiff has not procured consent or permission from the defendant to cross the private rights of way and easements owned by defendant and occupied by its pipe line and telephone line nor to make changes in said lines, although plaintiff's rights of way were procured and acquired with full knowledge of

the interests and rights of defendant; admits that plans and specifications for said highways have been adopted and approved by plaintiff and admits the necessity for the construction of such highways as alleged; admits that at [fol. 13] various points along said proposed highways the same will cross and intersect privately owned rights of way of the defendant, which rights of way or easements are being used and occupied by the defendant for the purpose of carrying on its business; admits the necessity of changing, lowering, encasing, or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described.

6. Answering paragraph 6, defendant admits the location and general nature of the changes in defendant's pipe lines and telephone lines, which changes should be made if said new highways are constructed and opened to the public.

7. Answering paragraph number 7, defendant admits that its estimates of the total cost of the various changes are as set forth and alleged by plaintiff, and further alleges that said estimates reflect the fair and reasonable estimated cost of making said changes.

8. Answering paragraph 8 of said motion, defendant admits that the relocation, removal or encasing of defendant's said pipe lines and telephone lines as requested by plaintiff may be done and accomplished without the acquisition of any other or different rights of way by defendant, but alleges that if defendant complies with the orders and demands of plaintiff it will be compelled to incur costs and expenses in the sum of not less than $5,460, the payment of no part of which plaintiff is willing to assume.

9. Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, and alleges that plaintiff has ordered that said changes be made at defendant's own cost and expense and without cost or expense to plaintiff; admits that plaintiff has furnished defendant with plans and specifications and all information necessary to make, accomplish and perform said changes, and admits

that defendant has failed and refused to conform therewith; admits that it has notified plaintiff that it would not make the changes in its said lines as ordered by plaintiff until plaintiff has indicated its willingness and intention to reimburse defendant for the reasonable cost of all required material and labor costs and expenses incurred by the defendant in making the changes in its said lines in conformity with the plans and specifications of said plaintiff. Defendant states that plaintiff's orders requiring defendant to make such changes at such enormous cost and expense to defendant are unreasonable, arbitrary, and void. De-
[fol. 14] fendant denies that the provisions of sec. 68-415, Revised Statutes of the state of Kansas, 1931 Supplement, have any application to changes, relocations, or removals of pipe lines and telephone lines located upon privately owned rights of way not located along, upon, or cross any existing state highway.

Defendant alleges and states that the pipe lines and telephone lines of the defendant at the locations set forth in said motion are all located on privately owned rights of way purchased and acquired by the defendant in the first instance from the owners of the land, and are not located along, upon, or across any existing state highway; that defendant acquired said rights of way in each instance from the owners of the land during the year 1930, and that the agreements for said rights of way were in each instance, during said year 1930, duly recorded in the office of the register of deeds of the county in which said lands are located. That immediately after the acquisition of said rights of way from the land owners, and during said year of 1930 and early in the year 1931, defendant duly entered into the possession of the land covered by said rights of way and constructed its said pipe lines and telephone lines over and through said land, and has at all times since been and is now in the possession thereof and is operating and maintaining its said pipe lines and telephone lines under and by virtue of the right and authority granted to it by the owners of the land under the terms of said agreements for rights of way. That all of said right of way agreements are in substantially the same form and substantially in the form of agreement for right of way executed on the 27th day of August, 1930, by A. A. Norton and A. R. Nor-

ton, his wife, as grantors, to this defendant as grantee, covering and upon lots 1 and 2 in the southeast quarter of section 8, township 19 south, range 17 east, Coffey county, Kansas, a copy of which is hereto attached, marked for identification as Exhibit A and made a part hereof; that the rights of way which plaintiff acquired from the owners of the land were acquired during the year 1933 and long subsequent to the time defendant acquired its rights of way and constructed its pipe lines and telephone lines, and with full knowledge of defendant's interests and rights therein and of the existence and operation of said pipe lines and telephone lines over and through said land. That said pipe lines and telephone lines at the locations described in plaintiff's said motion are permanently installed and constitute improvements of a permanent nature and are operated and used by the defendant in carrying on its [fol. 15] business in the transportation of gas produced in the gas fields of Texas, Oklahoma, and other states, into and through the states of Kansas, Missouri, and other states, and as such are used in carrying on business in interstate commerce. That said telephone lines are privately owned and operated by the defendant for the private use of the defendant, its officers, agents, servants and employees in carrying on defendant's business, and that the same are not operated or used, directly or indirectly, by the public nor for the public use.

Defendant further alleges that if sec. 68-415, R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon, or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States, and particularly the fifth amendment, and sec. 1 of the fourteenth amendment to the constitution of the United States, in that such construction will operate to take defendant's private property without due process of law and will deny to defendant the equal protection of the laws; that to require defendant to make such changes at its sole cost and expense will

operate to unreasonably interfere with defendant's business of transporting natural gas in interstate commerce contrary to the commerce clause of the constitution of the United States, sec. 8, art. 1, of said constitution.

10. Answering the allegations of paragraph 10 of said motion, defendant admits that plaintiff is not in position to make the changes or to attempt to make such changes in defendant's pipe lines and telephone lines, and that it would be impractical to attempt to make such changes, and admits that such work can be accomplished efficiently and with reasonable safety only by persons acting under the control of the defendant.

11. Defendant denies that its rights in its rights of way involved herein are servient and subject to the needs, demands, and requirements of the plaintiff to the extent that defendant may be required to expend enormous sums of money in making changes and relocations in its said pipe lines and telephone lines to suit the needs and demands of plaintiff without being duly compensated therefor. Defendant states that its said pipe lines and telephone lines are located upon privately owned rights of way as afore-[fol. 16] said, and are not located along, upon, or across any existing state highways, and that to require defendant to make such changes and relocations at its own cost and expense will constitute a taking of defendant's private property without due process of law contrary to the provisions of the constitution of the United States as aforesaid; that defendant is ready and willing, and has so notified plaintiff, to make the changes, relocations, and removals as required by the plaintiff, in accordance with its plans and specifications, upon proper commitment for reimbursement by the plaintiff for the reasonable cost and expense which defendant will incur in making such changes and relocations as requested and demanded by plaintiff under its said plans and specifications, but that said plaintiff denies that it is obligated or liable to reimburse defendant for such costs and expenses or any part thereof, and insists that defendant make such changes at its own cost and expense

Wherefore, having fully answered, defendant prays that the alternative writ of mandamus issued herein on Jan-

uary 15, 1934, be vacated, set aside, and held for naught, and that plaintiff's prayer for a peremptory writ of mandamus be denied and that defendant may be dismissed with its costs herein expended.

Panhandle Eastern Pipe Line Company, By G. J. Neuner, Its Attorney.

EXHIBIT "A" TO ANSWER

Agreement for Right of Way

Know all men by these presents, that A. A. Norton and A. R. Norton, his wife, of the post office of Wayerly, in the state of Kansas, for and in consideration of one ($1.00) dollar, and other valuable consideration to us in hand paid, receipt of which is hereby acknowledged, we hereby grant and convey unto Panhandle Eastern Pipeline Co. of Kansas City, Missouri, its successors and assigns, a right of way to lay, maintain, alter, repair, operate and remove pipe lines and from time to time parallel pipe lines, drips, gates, telegraph and telephone lines and all appurtenances convenient for the transportation of oil, gas or other substances, together with the right of ingress and egress, over and through the following premises in the county of Coffey in the state of Kansas, to wit:

Lots 1 and 2 in southeast quarter of Section 8, twp. 19 S. range 17E.

[fol. 17] It is further provided and agreed that all surplus rock and earth, shall be removed from right of way after settling, backfilling and completion of line.

It is expressly agreed that width of right of way shall not exceed two and one-half (2½) rods.

It is further agreed that all hauling and transportation of pipe and necessary material shall be confined to specified right of way as near as possible.

It is further provided and agreed that this contract carries the privilege for one line only.

Grantee to maintain, replace or put back all fences and gates during the period of construction; and grantee further agrees to bury pipe line below plow depth during the life time or duration of line.

Should there be any telephone, telegraph or electric lines to follow pipe line, same to follow section lines of the above described property.

Said sum is acknowledged as full consideration for the right of way. All damage to growing crops or other property occasioned by the installation of the first line or by making future repairs or in removing said property, or by laying, repairing or removing other lines, drips and gates, shall be paid by grantee after the damage is done; said damages, if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one to be appointed by the grantor, one by the grantee; and the third by the two so appointed; and the written award of such three persons shall be final and conclusive.

Grantee to place tap in line for domestic use upon the above described land.

It is hereby understood that this agreement cannot be changed in any way except in writing, signed by the grantor, and a duly authorized agent of the grantee.

Signed this 27th day of Aug., 1930.

(Signed) A. A. Norton, A. R. Norton.

Witnesses: (Signed) Elmer Conklin.

STATE OF KANSAS,
County of Coffey, ss:

Be it remembered that on this 27th day of August, 1930, before me the undersigned notary public, personally came A. A. Norton and A. R. Norton, his wife, who is personally known to me to be the same persons who executed the foregoing instrument of writing, and as such persons duly acknowledged the execution of the same.

In witness whereof. I have hereunto set my hand and affixed my official seal at Waverly, Kansas, on the day and year last above written.

(Signed) E. A. Farrow, Notary Public. (Seal.) My commission expires Mar. 11, 1933.

[fols. 18 & 19] IN SUPREME COURT OF KANSAS

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the State Highway Commission, and moves the court for judgment herein on the pleadings for the reasons,

First. That no issue of fact is presented by the pleadings, and,

Second. For the reason that the pleadings show that the plaintiff is entitled to a peremptory writ of mandamus herein.

Wint Smith, Otho W. Lomax, Attorneys for Plaintiff.

To Panhandle Eastern Pipeline Company, defendant, and J. G. Neuner, it's attorney of record.

Notice

You are hereby notified that the foregoing motion will be called up for hearing in the supreme court of the state of Kansas, on Friday, January 26, 1934, at the hour of 9:30 a. m., or as soon thereafter as the same may be heard.

Wint Smith, Otho W. Lomax, Attorneys for Plaintiff.

Service of a copy of the foregoing motion is hereby acknowledged, this — day of January, 1934.

—— —— Attorney for Defendant.

[fols. 20 & 21] IN SUPREME COURT OF KANSAS

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Filed January 26, 1934

This cause comes on for hearing upon the pleadings filed herein, and thereupon after oral argument by Otho Lomax, for the plaintiff and by G. J. Neuner for the defendant said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

[fols. 22 & 23] IN SUPREME COURT OF KANSAS

No. 31804

STATE HIGHWAY COMMISSION, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

JUDGMENT—March 10, 1934

Thise cause comes on for decision and thereupon it is ordered and adjudged that the judgment herein be entered in favor of the plaintiff and against the defendants for costs. It is further ordered that the clerk of this court issue a peremptory writ of mandamus herein to the defendant commanding it to car-y out the terms of the judgment of this court herein.

It is further ordered that the defendant pay the costs of this cause in this court taxed at $—, and hereof let execution issue.

[fol. 24] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION, Plaintiff

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

Syllabus by the Court

1. Requirements of the state highway commission that a pipe line company make, at its own expense, changes in its pipe line located on the company's right of way procured from landowners, necessitated by subsequent location of a state highway on overlapping right of way procured from the landowners by the state highway commission for highway purposes, considered, and held, the requirements were authorized by chapter 225, Laws 1929.

2. The statute and the requirements do not invade rights secured to the pipe line company by provisions of the Con-

stitution of the United State relating to deprivation of property without due process of law, equal protection of the laws, and interstate commerce.

Original proceedings in mandamus. Peremptory writ of mandamus allowed.

Wint Smith, attorney for the state highway commission, and Otho W. Lomax, of Cherryvale, for the plaintiff.

G. J. Neuner, of Kansas City, Mo., for the defendant.

OPINION—Filed March 10, 1934

The opinion of the court was delivered by BURCH, J.:

The action is one of mandamus, commenced by the state highway commission, to require the pipe line company to adjust its pipe lines and other structures to highway needs.

The parties have collaborated in a most commendable manner in preparation of the motion for the alternative writ and the answer. Issues of fact have been eliminated, [fol. 25] and the highway commission's motion for judgment on the pleadings raises the legal question on which the parties differ. A summary of the pleadings sufficient to indicate the nature of the controversy follows.

The state highway commission is a department of the state government having authority over the state highway system. It possesses power and is charged with duty to establish, construct and maintain, and to alter, vacate, reestablish and reconstruct highways in every county of the state. The pipe line company is a Delaware corporation, engaged in the business of transporting natural gas by pipe line from gas fields of Texas, Oklahoma, and other states, through the states of Kansas and Missouri, and other states. In prosecution of its business, which is both interstate and intrastate, it owns, maintains and operates a system of pipe lines, and in connection therewith telephone and telegraph lines. The pipe line company's lines are all located on its own rights of way, procured from landowners, and none of the lines is located on, along, or across any previously existing highway.

The highway commission is engaged in making certain necessary highway improvements. These improvements consist in widening existing highways and in constructing new highways. In making these improvements the high-

way commission encounters the lines of the pipe line company. The highway commission has acquired rights of way for the highway improvements from landowners, but has not obtained consent of the pipe line company to cross or occupy its rights of way.

The highway improvements necessitate certain changes in the pipe line company's lines. In some instances it is necessary the pipe line be lowered and encased. In other instances it is necessary the pipe line be encased. In other instances it is necessary the pipe line and telephone line be removed to the outer edge of right of way newly acquired by the highway commission for the purpose of widening existing highways. None of the changes will require the pipe line company to acquire any new or additional right of way.

[fol. 26] The highway commission has prepared plans and specifications for the changes described. The highway commission is not so well equipped to make the changes as the pipe line company, and the work of making the changes should be done by the pipe line company's experts. The cost will be in the aggregate not less than $5,460. The highway commission has required the pipe line company to make the changes at its own expense. The pipe line company is willing to make the changes according to the plans, but not at its own expense.

The pipe line company contends that, because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained and the present improvements had been initiated, it is entitled to compensation for all necessary expenditures incurred in making an adjustment of its private use to the later public use of the same rights of way. Certain decisions of this court are cited in support of the contention.

In a series of cases beginning with K. C. Rld. Co. v. Comm'rs of Jackson Co., 45 Kan. 716, 26 Pac. 394, and ending with a per curiam decision in S. K. Rly. Co. v. Comm'rs of Johnson Co., 52 Kan. 138, 34 Pac. 396, it was held that when a highway was constructed across an existing right of way, the railroad company was entitled to damages. These cases were decided by a divided court and, as the court subsequently observed in the opinion in the case of The State, ex rel., v. Railway Co., 95 Kan. 22, 27, 147 Pac. 801, were against the great weight of authority.

The decisions simply gave literal effect to the eminent domain statute providing for damages, and are no longer controlling because of enactment of the present highway law regulating highway crossings of railroads under the state's police power.

The pipe line company refers to the case of City of Wichita v. Wichita Union Terminal Rly. Co., 127 Kan. 855, 275 Pac. 171. In that case a city street which did not cross a railroad right of way was vacated. Afterwards the street was reopened. Then the city undertook to compel the railroad company to construct a subway under its tracks, at its own expense. So far as the evidence disclosed, there was not then and never had been a street which [fol. 27] crossed the railroad right of way at the location of the proposed subway, and the subway would not be on any street.

The pipe line company refers to the case of Cities Service Gas Co. v. Riverside Drainage Dist., 137 Kan. 410, 20 Pac. (2d) 520. In that case a small stream crossed a 12-acre tract of land owned by the gas company, on which was located its compressor station. The gas company owned the bed and banks of the stream. Beneath the bed of the stream the gas company maintained a large pipe line for transportation of natural gas. The tract was within a drainage district which had power to widen and deepen the stream. Desiring to enlarge the water course, the drainage district instituted condemnation proceedings under a statute providing for appraisal of land taken, and assessment of other damages sustained by landowners, to be paid by the drainage district. The gas company was put to great expense, $2,389.17, in adapting its high pressure pipe line to the situation created by enlargement of the water course, and appealed from the award of damages. The trial in the district court was had on the theory the gas company was entitled to damages, but the court misinstructed the jury with respect to ascertainment of damages. One instruction was based on the theory the gas company did not own the bed of the stream, another instruction was based on the theory the pipe line was an obstruction of a natural water course, and the jury was instructed the gas company could not recover damages consisting of expense of removing and replacing the pipe line to accord with the drainage district improvement.

When the case reached this court, an effort was made to justify the instruction on the theory of exercise of police power. In the opinion it was said private property may not be appropriated without compensation under guise of the police power, and it was further said:

"In an ordinary case of condemnation and appropriation of an owner's property, as in the present case, the constitutional right to compensation cannot be ignored or denied." (P. 414.)

The following excerpts from the opinion recognized phases of exercise of police power over use of streets and highways:

[fol. 28] "There are cases, too, where franchises have been granted to a street-car company, gas company, telephone company, and the like, to place rails, poles and pipes in public streets and other highways, and which they can be required to move without compensation. The primary use of the highways is for public travel, and the companies accept the grants and occupy the highways with their utilities on the implied and reserved power of the city to require their removal when the streets are needed for the higher purpose of public travel and the public safety.

. . . . . .

"Cases cited by plaintiff that the city may require a corporation occupying the streets to lower tracks and a gas and water pipe, by reason of changes of grades of streets, without being entitled to damages from the city, like that of Scranton Gas Co. v. Scranton City, 214 Pa. St. 586, are not applicable here. The city had the superior and reserved power in the streets and could exercise the police power to require changes for the convenience and safety of the public without paying compensation to a corporation holding a grant or easement over the street." (Cities Service Gas Co. v. Riverside Drainage Dist., 137 Kan. 410, 414, 415, 20 Pac. (2d) 520.)

Because the proceeding was an ordinary condemnation proceeding, and not a proceeding under the police power of the state, the judgment of the district court was reversed, and the cause was remanded for a new trial.

The highway commission is given power to condemn land or any interest therein, such as the pipe line company's easements, for highway purposes. The power is to be exercised in accordance with the general eminent domain statute, which provides for assessment and payment of damages. In this instance, however, the requirements of the state highway commission with respect to the pipe line changes were not made in or in connection with any eminent domain proceeding, and condemnation cases may be left at one side.

Paragraph 5 of the motion for the writ contains the following:

[fol. 29] "It is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the pipe line company be changed, lowered, encased or moved, all in accordance with the plans and specifications adopted and approved by the highway commission for the completion of said highway improvement."

The answer of the pipe line company contains the following:

"Answering the allegations of paragraph 5 of said motion, defendant * * * admits the necessity for the construction of such highways as alleged; admits that at various points along said proposed highways the same will cross and intersect privately owned rights of way of the defendant, which rights of way or easements are being used and occupied by the defendant for the purpose of carrying on its business; admits the necessity of changing, lowering, encasing, or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described."

What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to co-users of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway

was established before or after the privately owned structures were established.

The principles just stated have been approved and applied in decisions of the Supreme Court of the United States. The case of Denver & R. G. R. R. Co. v. Denver, 250 U. S. 241, involved removal of a railroad track from a street corssing. The opinion contains the following reference to previous cases:

[fol. 30] "The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis, 232 U. S. 430; Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe. New York & New England R. R. Co. v. Bristol, 151 U. S. 556; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there. Baltimore v. Baltimore Trust Co., 166 U. S. 673; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another location at its own cost to make room for a public drainage system, New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453." (P. 244.)

In the New Orleans Gas & Light Co. case, just cited, the headnotes summarize the decision as follows:

"The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.

"Every reason of public policy requires that grants in the sub-surface of streets shall be held subject to such reasonable regulation as the public health and safety may require.

[fol. 31] "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking of property without due compensation.

"Under the facts of this case, the changing of the location of gas pipes at the expense of the gas company to accommodate a system of drainage, which has been upheld by the state court as an execution of the police power of the state, does not amount to a deprivation of property without due process of law." (New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453.)

The case of Erie R. R. Co. v. Public Util. Comm'rs, 254 U. S. 394, and cases consolidated with it, involved elimination of railroad grade crossings, removal of water mains, and removal of a telegraph line. The opinion by Justice Holmes refers to previous cases, and contains illuminating discussion of principles.

Since the pipe line company persistently contends it may not be compelled to adapt, at its own expense, its use of the highway to safe public use, because it was on the ground first, it may be well to quote the summary of a portion of the opinion in the Erie case contained in the headnote:

"A state may require a railroad company to do away with grade crossings of public streets, whether laid out before or after the construction of the railroad, and may place upon the company the expense of executing the state's plan to accomplish this by running the streets over or beneath the tracks." (¶ 1.)

[fol. 32] The pipe line company contends it may not be compelled to obey the highway commission's regulations without a statute authorizing the regulations. There is no contention that exercise of the state's police power over the subject may not be committed to the state highway commission, and this was in fact done by chapter 225, Laws 1929. Sections 3 and 8 of the chapter read in part as follows:

"The state highway commission shall designate, adopt and establish and may lay out, open, relocate, alter, vacate, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 8,690 miles. * * * The state highway system thus designated shall be constructed, improved, reconstructed and maintained by the state highway commission from funds hereinafter and otherwise by law provided." (§ 3.)

"The state highway commission is authorized to perform all work, * * * incident to the construction, improvement, reconstruction and maintenance of the state highway system * * * and shall take such steps as will give the provisions of this act full force and effect. * * *" (§ 8.)

These are broad grants of power, and were intended to embrace all details essential to effective establishment, construction and maintenance of the state highway system. The purpose was to have a highway system constructed in such manner that use of it would not be dangerous to the traveling public. Provision was made for an engineering department of the highway commission, and it was contemplated the engineers' plans for construction of any highway would include whatever was necessary to appropriate and safe construction. As indicated, the highway commission was authorized to do the work.

In section 15 of the act specific authority was given to the highway commission to compel steam and electric railroads to construct grade crossings at their own expense. Specific authority was also given to compel such railroads to construct viaducts, tunnels, underpasses and bridges for the safety of the general public. It was provided that for such work the highway commission may pay what in its judgment would be a fair and equitable proportion of the cost, not exceeding 50 per cent.

[fol. 33] Paragraph 16 relates to telegraph, telephone and electric transmission lines, and to pipe lines conveying oil, gas, and water. A copy of the section is appended to this opinion. The statute took effect on April 1, 1929. The pipe line company's rights of way were acquired in 1930, and its lines were constructed in 1930 and 1931. The highway commission acquired its rights of way over the same lands for highway purposes in 1933. The pipe line company contends the statute has no application to highways established after the act took effect which encounter existing pipe lines. The question thus raised is one of statutory interpretation.

Section 16 is readily divisible into three parts, connected by the conjunction "and". Omitting all structures except pipe lines, omitting the conjunction, stating and numbering each part separately and omitting the concluding portion of the third part. the statute reads:

1. Whenever any corporation created * * * for the purpose of constructing and maintaining lines * * * for the purpose of transporting * * * gas * * * by pipe lines * * * shall construct or maintain pipe lines * * * along, upon or across any state highway, such * * * pipe lines shall be located upon that part of the right of way of said state highway designated by the state highway commission.

2. The state highway commission is authorized and empowered to require the removal of * * * pipe lines * * * now upon state highways from the present location on said state highways to such part of the right of way of said state highways at the state highway commission shall designate.

3. If said corporation, upon receiving notice of the requirement of the state highway commission that said * * * pipe lines * * * be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove said * * * pipe lines * * * to such place on the right of way of said state highways as may be designated by the state highway commission, and the cost of such removal shall be paid to said state highway commission by said [fol. 34] * * * corporation upon a statement of cost being furnished to said * * * corporation.

In support of its contention, the pipe line company directs special attention to the second division of the section, and says the language is limited to removal of pipe lines "now on said highways from their present locations." The argument is that removal of an existing line from an existing highway is something entirely different from removal of an existing line when a new highway crosses or occupies the right of way. It is said removal in the former instance may be accomplished by exercise of the police power but removal in the latter instance must be accomplished by condemnation.

The distinction indicated was the basis for the old contention that the new highway could not cross a railroad right of way without payment of compensation, and is unsound. As in the case of railroads, whether the pipe line is established first or the highway is established first, the power to regulate the pipe line is the same. If the pipe line

came first, it is not deprived of right of way or continued use; but the common use of the same right of way for pipe line purposes and highway purposes may be regulated by exercise of the police power for protection of the traveling public. Assuming that the words "now" and "present" appearing in the second subdivision of the section are to be accorded their literal meaning, they were not inserted for the purpose of discriminating between old highways and highways to be constructed in the future.

The act of 1929 discloses it was passed to meet the needs of social and economic conditions which had been revolutionized through perfection of the motor vehicle. As indicated above, the highway commission was charged with establishment of a state wide system of improved highways reaching a possible length of 8,690 miles. This system would carry not only Model T's but the great interstate and intrastate passenger busses and freight trucks. Old highways were to be relocated and reconstructed and new highways were to be located and constructed. There would necessarily be contacts with lines of railroads, with telegraph, telephone, and electric transmission lines, and with pipe lines for transportation of oil, gas, and water. [fol. 35] There would be contacts of both old and new highways with old and new lines. The general grant of power to deal effectively with an enterprise of this magnitude in the interest of the public convenience and safety, has been discussed, and the statute is not to be interpreted in any narrow, technical or illiberal manner. Established occupation of existing highways by pipe lines was given no immunity from regulation. The greatest menace to safety was the grade railroad crossing. In providing for regulation of such crossings, no distinction was made between existing highways and future highways across existing tracks. The pipe line company ventures no argument grounded on purpose of the act or nature of the subject for an exception to regulation of its pipe line, and the need of regulation is precisely the same whether the pipe line or the highway first arrives at a given locality.

The first subdivision of section 16 of the statute provides in effect that whenever a pipe line is constructed along, upon, or across any highway, its location is subject to control by the highway commission. Regulation of original construction of a pipe line is thus provided for. But the

section also provides that whenever a company shall maintain a pipe line upon, along, or across any highway location is subject to regulation.

The motion for the writ alleges and the answer admits the following:

1. The highway commission is engaged in improving, widening, relocating, constructing and reconstructing certain highways.

2. The highway commission has procured rights of way for the improvements.

3. Plans and specifications for the improvements have been prepared and adopted. The motion states that contracts have been let, but admission of this fact is not specifically made in the answer.

4. The motion states that at various points the highway rights of way which have been secured lie across and intersect the rights of way of the pipe line company. The answer admits that the "proposed highways" lie across and intersect the pipe line company's right of way. The court construes "proposed highways" to embrace highway rights of way which have admittedly been procured.

[fol. 36] 5. The highway commission has prepared and furnished to the pipe line company plans and specifications for the changes necessary at the points where rights of way overlap.

With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, estaboished and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission.

Besides what has been said, the whole act is prospective in its operation. Under a rule for interpretation of statutes in force in this state, words which literally refer to the time a statute takes effect may be read as applicable to the situation existing at the time contemplated action is to be taken. (The State, ex rel., v. City of Lawrence, 101 Kan. 225, 165 Pac. 826.) If, as suggested in the case just cited, the word "already" be substituted for the word "now," in the second subdivision of the section, there

would be no sound basis for a claim that the pipe line company's pipe line is exempt from regulation. Such an exemption would be out of harmony with the whole spirit and purpose of the act, and the court holds the statute should be read to deny the exemption.

The pipe line company contends a grant of power to the highway commission to require removal of structures might be extended to removal of a structure such as a compressor station. The statute grants no such power. The highway commission is not attempting to exercise any such power and, if it were, the court ventures the dictum the highway commission could be enjoined.

The pipe line company's answer asserts the changes required by the highway commission are arbitrary and unreasonable because of the enormous cost of the required changes. There is no contention the cost is excessive in view of the character and amount of work to be done. Necessity for the changes in the interest of public safety [fol. 37] is admitted. In the case of Erie R. R. Co. v. Public Util. Commrs. 254 U. S. 394 referred to above, the railroad company asserted that if any more changes were required the company would soon be bankrupt. In the opinion the court said:

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places in which the public is invited and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down

whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil." (P. 410.)

[fol. 38] The answer duly pleaded violation of rights secured to the pipe line company by provisions of the Constitution of the United States relating to taking private property without due process of law, equal protection of the laws, and interstate commerce. Whatever burden on interstate commerce adjustment of the pipe line company's use of the highways to highway uses may occasion, is purely incidental to proper exercise of the state's police power. Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with repect to apportionment of cost, was not unreasonable. The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law. Therefore, none of plaintiff's constitutional rights was invaded.

The peremptory writ of mandamus is allowed.

All the justices concurring.

A true copy. Attest:
E. E. Clark, Clerk, Supreme Court. (Seal.)

[fol. 39] Section 16, chapter 225, Laws of 1929 reads as follows:

Removal of poles, piers, abutments, pipe lines or other fixtures along highway; procedure.—Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and main-

taining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highway as the state highway commission shall designate, and if said person, firm, or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highway as may be designated by said state highway commission, and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of costs being furnished to said person, firm or corporation. If said person, firm, or corporation refuses to pay said charges, the state highway commission shall notify the attorney general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such person. firms or corporations shall be placed in the funds from which the cost of such removal was paid.

[fol. 40] Be it further remembered, that on the 29th day of March, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for a rehearing prepared by the defendant herein; and afterwards and on the 9th day of June, 1934, the same being one of the regular judicial days of the January 1934, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka,

the following proceedings among others was had and remain of record in the words and figures as follows to wit:

[fols. 41 & 42] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 9, 1934

Now comes on for decision the motion for a rehearing of this cause and thereupon it is ordered, that said motion for a rehearing be denied.

[fol. 43] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF KANSAS, Plaintiff,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

OPINION DENYING REHEARING—Filed June 9, 1934

BURCH, J.:

In a petition for rehearing the pipe line company undertakes to limit an admission in its answer in such a way that, as against a motion for judgment on the pleadings, a question of fact would be raised by the general denial contained in the answer.

The motion for the writ alleged the highway commission was engaged in highway construction and improvement, had for the purpose procured rights of way, and the highway changes are necessary for public safety and convenience. The answer admitted "necessity for the construction of such highways, as alleged."

The motion for the writ alleged plans and specifications for the highway improvement had been adopted, and the highways would intersect pipe line rights of way. The motion described the specific pipe line changes "necessary to be made." The motion also contained the following allegation:

"It is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the pipe line company be changed, lowered, encased or moved, all in accordance with the plans and specifications adopted and approved by the highway commission for the completion of said highway improvement."

The answer admitted adoption of the plans and specifications, and admitted "such changes should be made if said new highways are constructed and opened to the public." The answer also contained the following:

[fols. 44 & 45] "Admits the necessity of changing, lowering, encasing or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described."

The answer then proceeded to enumerate reasons why the pipe line company should not be required to make the changes at its own expense. It is now said the last quoted admission went only to necessity, and not to necessity in the interest of public safety. The admission was of necessity "as alleged," and the allegation was of necessity plus interest of public safety. The pleadings are not to be considered as ancient common law pleadings in a criminal case, but according to their fair import. The point now made was not presented in the pipe line company's brief as one bearing on the subject of exercise of the police power of the state by the highway commission, is evidently an afterthought, and is not well taken.

Besides what has been said, when unqualified necessity for the pipe line changes as a feature of highway construction was expressly admitted, basis for exercise of the police power was admitted, and the pipe line company would be in the same situation if its point on the pleadings were well taken.

The petition for rehearing contains nothing of substance which is new, and it is denied.

All the justices concurring.

A true copy. Attest:
E. E. Clark, Clerk, Supreme Court. (Seal.)

[fol. 46] IN SUPREME COURT OF KANSAS

[Title omitted]

PEREMPTORY WRIT OF MANDAMUS—July 6, 1934

Whereas, on January 15, 1934, the plaintiff, State Highway Commission of Kansas, filed its verified motion for an alternative writ of mandamus herein which motion was granted, and alternative writ of mandamus issued to defendant, Panhandle Eastern Pipeline Company, directing it to forthwith proceed to make and complete certain changes in its pipelines and telephone lines specifically described in the alternative writ, and

Whereas, said defendant filed its answer on January 18, 1934 on which day plaintiff filed its motion for judgment on the pleadings, and

Whereas, on January 26, 1934, said cause was fully argued and submitted to the Supreme Court of Kansas for its determination and decision, and

Whereas, on March 10, 1934, the Supreme Court of the [fol. 47] State of Kansas filed its written opinion herein, directing that the alternative writ of mandamus be made peremptory, such written opinion appearing in 139 Kan. page 185 (Advance Sheet #1), and

Whereas, defendant filed its motion for a rehearing on March 29, 1934 and the plaintiff filed its reply on April 7, 1934, and

Whereas, on April 13, 1934, the firm of Burch, Litowich & Royce of Salina, Kansas were given twenty days in which to file briefs amicus curiae in support of defendant's application for a rehearing, and

Whereas, on June 9, 1934, the Supreme Court of the State of Kansas having fully considered and determined the matter and being fully advised in the premises filed its opinion denying said application for a rehearing, such decision being reported in 139 Kan. page 849 (Advance Sheet #4),

It is therefore by the court, considered, ordered, and adjudged, that the Panhandle Eastern Pipeline Company be and it is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike man-

ner the changes in its lines hereinafter specified in accordance with the orders, plans, and specifications, adopted and [fol. 48] approved by the State Highway Commission of Kansas for the improvement of the highways hereinafter referred to:

(a) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective right of ways being in section 20, township 13, south, range 21, east, said point being located on newly acquired highway right of way.

(b) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 1; the point of intersection of the respective right of ways being located in the southeast quarter of section 8, township 19, south, range 17, east, on newly acquired highway right of way.

(c) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16, east, in Coffey county, Kansas, where the pipe line crosses diagonally the present highway, which is being widened forty feet by the acquisition of new right of way.

(d) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective right of ways being in section 16, township 19 south, range 21, east, Franklin county, Kansas, on new highway right of way.

(e) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widening highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19, south, range 17, east, and sections 13, 14, 15 and 16 in township 19 south, range 16 east.

(f) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8 in Pratt county,

Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13, west.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 49] Clerk's Certificate to transcript omitted in printing.

[fol. 50] IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 27, 1934

The said Panhandle Eastern Pipe Line Company assigns the following errors in the record and proceedings in said case.

First. The Supreme Court of the State of Kansas erred in holding and deciding that Sec. 16, Ch. 225, Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement) whereunder the State Highway Commission of Kansas, an administrative agency, ordered and required the defendant, Panhandle Eastern Pipe Line Company, at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon, or across any existing state highway, in order to accommodate said rights of way and easements, pipe lines and telephone lines to the plans and specifications of said Highway Commission for the construction of new highways across the same is, as applied to defendant, valid and constitutional; and in holding and deciding that the said order and requirement of said State Highway Commission made solely under and pursuant to said statute are valid and constitutional, and impose an enforceable and constitutional legal obligation on defendant to obey said requirement; and in ordering defendant by peremptory writ of mandamus to obey and perform said order and requirement; the error being that the construction and interpretation of said statute in said manner makes said statute unconstitutional and void under the provisions of the Constitution of the United States and particularly Sec. 1 of the Fourteenth Amendment to said constitution, in that said

statute when so construed and interpreted and said order of the State Highway Commission made thereunder are uncon- [fol. 51] stitutional, null and void and operate to take said defendant's property without due process of law and deny to it the equal protection of the laws; said statute when so construed and interpreted, by its terms undertakes to delegate to the State Highway Commission, an administrative agency, the arbitrary power to make, and said commission did, pursuant solely to the supposed authority of said statute, make, said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary ex parte decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said State Highway Commission, an enforcible and final legal duty to comply with such order and perform the requirements of said State Highway Commission; thus depriving defendant of due process of law and taking its property without due process of law; that in said suit there was expressly drawn in question the validity of said statute of the State of Kansas when so construed and interpreted on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Kansas is in favor of its validity, which decision is hereby assigned as error.

Second. The Supreme Court of the State of Kansas erred in upholding as valid and constitutional an order of the State Highway Commission of Kansas made solely under and pursuant to the supposed authority of Section 16, Ch. 225, Laws of Kansas 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) under which order the State Highway Commission of Kansas required the defendant herein, at its own cost and expense, to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon or across any existing state highway, in order to accommodate defendant's said rights of way and easements, pipe lines and telephone lines to the

plans and specifications of said State Highway Commission for the construction of new highways, by reason of which the said Supreme Court of the State of Kansas has in effect held that said statute and the order of the State Highway [fol. 52] Commission made pursuant thereto, do not violate Sec. 1 of the Fourteenth Amendment, or Section 8, Art. 1 of the Constitution of the United States, which holding and decision is hereby assigned as error.

Third. In said suit there was expressly drawn in question the validity and constitutionality of a statute of the State of Kansas, namely, Sec. 16, Ch. 225, Laws of 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) on the ground that if the same is construed and interpreted to mean that the State Highway Commission may by its order require the defendant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and not located along, upon or across any existing state highway, in order to accommodate the same to the plans and specifications of the Highway Commission for the construction of new highways across the same, that said statute is repugnant to the due process and equal protection clause of the Constitution of the United States, Sec. 1 of the Fourteenth Amendment, and also repugnant to Sec. 8 of Art. 1 of said Constitution. The decision of the Supreme Court of the State of Kansas was in favor of the validity and constitutionality of said statute when so construed and interpreted, which decision is hereby assigned as error.

For which errors Panhandle Eastern Pipe Line Company prays that the said judgment of the Supreme Court of the State of Kansas, dated March 10, 1934 and made final by order of said Supreme Court of Kansas dated June 9, 1934, in the above entitled cause be reversed and judgment rendered in favor of said Panhandle Eastern Pipe Line Company.

Dated this 27 day of August, 1934.

G. J. Neuner, Chester J. Gerkin, Counsel for Appellant.

[fol. 53] [File endorsement omitted.]

[fol. 54] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 27, 1934

To the Chief Justice of the Supreme Court of the State of Kansas:

Panhandle Eastern Pipe Line Company, your petitioner, respectfully shows:

First. Petitioner is the defendant in the above entitled cause.

Second. The above named plaintiff, The State Highway Commission of Kansas, filed a verified motion in the Supreme Court of the State of Kansas on the 15th day of January, 1934, for an alternative writ of mandamus against the petitioner, Panhandle Eastern Pipe Line Company, alleging and averring that the construction and improvement of certain state highways in the State of Kansas is being hindered and delayed by the unlawful neglect and refusal of said Panhandle Eastern Pipe Line Company to make certain changes in its pipe lines in accordance with the orders, plans and specifications adopted and promulgated by the State Highway Commission of Kansas; that said plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the State of Kansas and that for such purposes it has procured the necessary rights of way for such improvements; that plans and specifications for such improvements have been adopted by said plaintiff and contracts let for the construction of said highways; that at various points along said highways the rights of way so procured for such purposes, cross and intersect privately owned rights of way of the defendant which are being used and occupied by said defendant for the purposes of its business; that it is necessary [fol. 55] in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the said defendant be changed, lowered, encased or moved in accordance with the plans and specifications adopted and approved by the said State Highway Commission for the

completion of said highway improvements; that the State Highway Commission has ordered and directed said defendant to make such changes in the location and design of its lines, all as contemplated and provided by R. S. 68-415, 1931 Supplement, (Sec. 16, Ch. 225, Laws of Kansas 1929), and has heretofore and on or before December 1, 1933, furnished said defendant with all necessary plans, specifications, and information necessary to enable said defendant to proceed to make, accomplish and perform all of said changes required by the improvement of said state highways, but that said defendant ever since has and now fails, neglect sand refuses to conform therewith. It was further alleged that said defendant specifically refuses to make such changes in its lines until the Highway Commission has entered into an obligation requiring it to pay the cost of all required material and labor and to indemnify it and pay for all damages inflicted or incurred in the performance of such work.

On said 15th day of January, 1934, an alternative writ of mandamus was issued by the Supreme Court of Kansas ordering and directing said Panhandle Eastern Pipe Line Company to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission for the improvement of the highways therein referred to or to show cause on or before January 25, 1934, why the same should not be done. Thereafter and on the 18th day of January, 1934, your petitioner duly filed its answer in said cause. Thereafter and on or about said 25th day of January, 1934, plaintiff duly filed its motion for judgment on the pleadings in said cause. Thereafter and on March 10, 1934, a decision was rendered therein in favor of the said plaintiff, The State Highway Commission of Kansas making said alternative writ of mandamus peremptory.

Third. Thereafter and within the time provided by the statutes of the State of Kansas, your petitioner duly applied for a rehearing, which was denied by the said Supreme Court of the State of Kansas on June 9, 1934. By said order denying a rehearing, the said order of the Supreme Court of the State of Kansas making said alternative writ of mandamus peremptory became final.

[fol. 56] Fourth. In said cause there is drawn in question the validity of a statute of the State of Kansas on the ground of its being repugnant to the constitution of the United States and the decision of the Supreme Court of Kansas, which is the highest Court of Kansas in which a decision could be had, is in favor of its validity in that Sec. 16, Ch. 225, Laws of Kansas 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement), is relied upon by the plaintiff in said case as authorizing it, the said plaintiff, to order and require the said defendant to make and perform the aforesaid changes in the design and construction of the said defendant's pipe lines and telephone lines at its own expense. Defendant contended and asserted in said suit that if said statute is given the construction and interpretation placed thereon by the said plaintiff, and if the same is construed and interpreted to mean that the said plaintiff may order and require the defendant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned property and at points where the same are not located along, upon or across any existing state highway, said statute as well as the order and requirement of said State Highway Commission, are unconstitutional and void under the provisions of the constitution of the United States, and particularly Sec. 1 of the fourteenth amendment to said constitution in that said statute when so construed and interpreted and the order and requirement of the State Highway Commission of Kansas, made solely under and pursuant to the supposed authority of said unconstitutional statute, are null and void and will operate to take defendant's private property without due process of law and will deny to the defendant the equal protection of the laws; and, further, that such construction and interpretation will operate to unreasonably interfere with the defendant's business of transporting natural gas in interstate commerce, contrary to the commerce clause of the constitution of the United States, Sec. 8, Art. 1 of said constitution. The decision of the Supreme Court of Kansas is in favor of the validity of said statute and of the validity of said order and requirement of said State Highway Commission based thereon.

Wherefore, petitioner prays for the allowance of an appeal from said Supreme Court of the State of Kansas to

[fol. 57] the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Kansas may be examined and reversed; and also prays that a transcript of the record, proceeedings and papers in this case duly authenticated by the Clerk of the Supreme Court of the State of Kansas may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the Assignment of Errors filed herewith.

Dated this 27 day of August, 1934.

G. J. Neuner, Chester J. Gerkin, Attorneys for Petitioner and Proposed Appellant.

[fol. 58] [File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER ALLOWING APPEAL—Filed Aug. 27, 1934

The petition of Panhandle Eastern Pipe Line Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Kansas and the assignment of errors filed therewith and the record of said cause having been considered;

It is ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Kansas as prayed in said petition, and that the Clerk of the Supreme Court of the State of Kansas shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty days from the date hereof.

It is further ordered that said Panhandle Eastern Pipe Line Company shall give good and sufficient security in the sum of $500.00 that said appellant shall prosecute said appeal to effect, and if said appellant fails to make its plea good, it shall answer all costs.

The said appellant now presenting a bond in the sum of $500.00 with National Surety Corporation as surety, it is Ordered that the same be, and is hereby approved.

Dated this 27 day of August, 1934.

W. A. Johnston, Chief Justice of the Supreme Court of Kansas. (Seal Supreme Court, State of Kansas.)

[fol. 60] [File endorsement omitted.]

[fol. 61] Citation in usual form showing service on Otho W. Lomax, filed Aug. 27, 1934, omitted in printing.

[fol. 62] IN SUPREME COURT OF KANSAS

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed Aug. 27, 1934

It is hereby stipulated and agreed by and between G. J. Neuner, Attorney for Panhandle Eastern Pipe Line Company, defendant above named, and Wint Smith and Otho W. Lomax, attorneys for the State Highway Commission of Kansas, plaintiff above named, that the portions of the record which shall constitute the transcript of record on the appeal to the Supreme Court of the United States herein, shall consist of the following:

1. Plaintiff's motion for an Alternative Writ of Mandamus.
2. Alternative Writ of Mandamus.
3. Answer of defendant with exhibit annexed thereto.
4. Motion of plaintiff for judgment on the pleadings.
5. Opinion of the Supreme Court of Kansas.
6. Opinion of the Supreme Court of Kansas denying rehearing.
7. Peremptory writ of Mandamus.
8. Petition for Appeal.
9. Assignment of Errors.

10. Order allowing Appeal.
11. Citation upon plaintiff.
12. This stipulation.
13. Appellant's statement as to jurisdiction.
14. Proof of service upon appellee of copies of petition for Appeal, order allowing Appeal, assignment of Errors and statement as to jurisdiction with acknowledgment of service annexed thereto.

[fol. 63] Said transcript to be prepared as required by law and rules of this state and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court at Washington, D. C., on or before the 6 day of October, 1934.

This stipulation is made and entered into pursuant to Rule 10 of the Supreme Court of the United States.

Dated this 27 day of August, 1934.

G. J. Neuner, Attorney and Solicitor for Appellant, Panhandle Eastern Pipe Line Company; Wint Smith, Otho W. Lomax, Attorneys and Solicitors for Appellee, the State Highway Commission of Kansas.

[fol. 64] [File endorsement omitted.]

[fol. 65] Certificate of transmittal omitted in printing.

[fol. 66] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Sept. 25, 1934

Comes now Panhandle Eastern Pipe Line Company, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

I

The order of the State Highway Commission of Kansas, an administrative agency, requiring appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon private property, and not located along, upon or across existing state highways, in order to conform the same to the plans and specifications of said Commission for the construction of new highways, which said order was made without prior notice, without a hearing, without evidence, and without an opportunity for appeal and general review, and Sec. 16, Ch. 225 of the Laws of Kansas, 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) construed by the Supreme Court of Kansas herein as giving said Commission the arbitrary power to make such order, and under the authority of which the Commission's order was purported to have been made, operate to take appellant's private property without due process of law and without just compensation and deny to it the equal protection of the laws, in violation of the Fifth Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and that said order and said statute are therefore unconstitutional and void.

[fol. 67] II

The order of the State Highway Commission of Kansas and Sec. 16, Ch. 225, Laws of Kansas, 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) as construed by the Supreme Court of Kansas, and under which said order was purported to have been made, are unconstitutional and void in that said order and said statute when so construed unreasonably interfere with appellant's business of transporting natural gas in interstate commerce, contrary to the commerce clause, Sec. 8, Art. 1, of the Constitution of the United States.

Appellant further states that the record as filed in this Court is deemed necessary to be printed for the consideration of the points set forth above.

Dated this 17th day of September, 1934.

G. J. Neuner, Counsel for Appellant.

Service acknowledged this 21 day of September, 1934.
Wint Smith, Otho W. Lomax, Counsel for Appellee.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 39,040. Kansas, Supreme Court. Term No. 412. Panhandle Eastern Pipe Line Company, Appellant, vs. State Highway Commission of Kansas. Filed September 25, 1934. File No. 412, O. T., 1934.

(5663-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (paragraph 1) of the Supreme Court of the United States, appellant (defendant below) presents this separate statement particularly disclosing the basis upon which it contends the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Kansas entered herein.

Statutory Provision Sustaining Jurisdiction.

The Supreme Court's jurisdiction in this case is invoked under Sec. 237 (a) of the Judicial Code of the United States, 43 Stat. 937 (28 U. S. C. Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Statute of the State of Kansas, the Validity of Which is Involved.

The Statute of Kansas, the validity of which, under the Constitution of the United States, is challenged is Sec. 16, Chapter 225, Laws of 1929 (Sec. 68-415 R. S. Kansas, 1931 Supp.), which reads as follows:

"Removal of poles, piers, abutments, pipe lines or other fixtures along highway; procedure.

"Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of

such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount; such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid."

Date of the Judgment Sought to Be Reviewed and of the Application for Appeal.

The judgment appealed from was entered on the 9th day of June, 1934, on which date the Supreme Court of Kansas overruled motion for rehearing and thereafter duly issued a peremptory writ of mandamus against the appellant. The application for an appeal was presented on the 27th day of August, 1934.

Nature of the Case and Rulings of the Court Below Which Bring it Within the Jurisdictional Provision Relied Upon.

The appellant (defendant below) is a Delaware corporation, duly licensed as a foreign corporation to carry on its business in the State of Kansas. It owns and operates a high pressure pipe line system and a telephone line in and through the State of Kansas which is used in transporting natural gas produced in Texas and other States into and through Kansas and other States in interstate commerce.

The appellee (plaintiff below) is an administrative agency created as a body corporate by legislative act and is by statute vested with the authority and charged with the duty to lay out, open, relocate, alter, vacate, redesignate and reestablish highways in the State of Kansas. It has authority to acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain to any lands or interests or rights therein for the purpose of carrying out its functions, duties and obligations.

In furtherance of its powers and duties with respect to locating and constructing new highways, appellee has laid out routes for certain new highways across privately owned lands in the State of Kansas. At six different points the proposed routes of such new highways intersect and cross the privately owned pipe line and/or telephone line and rights of way of the appellant. The pipe line and telephone line of the appellant are located upon private lands, and are not located upon, along or across any existing highway. The appellant acquired its rights of way at said points from the owners of the land during the year 1930. The right of way grants from landowners gave appellant a perpetual right to lay, maintain, alter, repair, operate and remove pipe lines, drips, gates, telephone and telegraph

lines and all appurtenances convenient for the transportation of oil, gas or other substances. Appellant constructed its said pipe line and telephone line during the years 1930 and 1931 and said lines have at all times since been maintained and operated across said land.

During the year 1933, the appellee acquired from the owners of the fee title, rights of way for the construction, operation and maintenance of public highways over these same lands. Appellee has not procured the consent or permission of the appellant to occupy its said right of way or to construct said highway across its said right of way; nor to make changes or alterations in appellant's said lines, nor to remove the same to another location; nor has it procured such right by condemnation. According to its plans and specifications appellee has found it necessary that changes and alterations be made in the design and location of appellant's pipe line and telephone line, requiring in certain instances the removal of said lines to a different location, in other instances the lowering of the lines below drainage ditch level and in others requiring the encasing thereof at points where the proposed highway will cross the same. Appellee ordered appellant to make such changes and alterations forthwith at appellant's own cost and expense and notified appellant that it would not bear such cost or any part thereof. The fair and reasonable cost of making such changes and alterations to conform with the appellee's plans and specifications amounts to the sum of $5460.00.

Upon refusal of appellant to comply with appellee's orders to make such changes and alterations in its said lines to conform to the construction, plans and specifications of appellee, the said appellee on January 15, 1934, filed a verified motion in the Supreme Court of Kansas for an alternative writ of mandamus requiring appellant to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with

the orders, plans and specifications adopted by the appellee for the improvement of the highways in question.

On said 15th day of January, 1934, an alternative writ of mandamus was issued by the Supreme Court of Kansas ordering and directing the appellant to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with the orders, plans and specifications adopted and approved by appellee or to show cause on or before January 25, 1934, why the same should not be done. Thereafter, and on or before said 25th day of January, 1934, appellant duly filed its answer in said cause.

Thereafter, and on or about the said 25th day of January, 1934, appellee filed its motion for judgment on the pleadings in said cause.

On March 10, 1934, a decision was rendered in said case in favor of the appellee making the alternative writ of mandamus theretofore issued peremptory. Thereafter, and within the time provided by the statutes of the State of Kansas and in accordance with the rules and practice of the Supreme Court of said State, appellant duly applied for a rehearing of said cause, which application the Supreme Court of Kansas denied on the 9th day of June, 1934, and thereafter entered its final judgment making the alternative writ of mandamus issued by said court peremptory.

The judgment of the Supreme Court of Kansas in upholding and sustaining the order of the State Highway Commission of Kansas ordering appellant to make changes and alterations in the construction and design of its pipe line and telephone line located upon private property, and not located upon, along or across an existing highway, is based upon the provisions of Sec. 16, Ch. 225, Laws of Kansas, 1929 (Sec. 68-415 R. S. Kansas, 1931 Supp.), which is a statute of the State of Kansas within the meaning of Sec. 237 (a) the Judicial Code.

In its answer filed in the Supreme Court of Kansas appellant set forth, alleged and contended that said statute applies only to changes and alterations in the design and construction of pipe lines and telephone lines constructed and installed along, upon or across existing highways, and not to such lines as are located upon private property or private rights of way and not located upon, along or across existing highways; that if construed and interpreted to mean that the State Highway Commission may require appellant at its own cost and expense to remove, relocate, change and alter the design of its pipe line and telephone line located upon privately owned property, and not located upon, along or across any existing State highway, said statute is unconstitutional and void as repugnant to the Constitution of the United States, in violation of the Fourteenth Amendment to the Federal Constitution and particularly of section one thereof, and that such construction and interpretation will operate to take appellant's private property without due process of law and will deny to said appellant the equal protection of the laws. In its said answer the said appellant set forth the facts on which it challenged the validity of said statute, if so construed and interpreted, as repugnant to the Constitution of the United States and particularly the Fifth Amendment, section one of the Fourteenth Amendment, and section eight of Article one of said Constitution.

Application or petition for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Kansas on the 27th day of August, 1934, and allowed by him on that day. The following cases and decisions of the Supreme Court of the United States are believed to sustain its jurisdiction of appeal:

Cumberland Coal Co. v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U. S. 23, 76 L. Ed. 146;

Detroit & Mackinac Ry. Co. v. *Michigan Railroad Com.*, 240 U. S. 564, 60 L. Ed. 802;

People of the State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184;

Brinkerhoff-Faris Trust & Savings Bank v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107;

Southern Railway Co. v. *Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 186;

Harold B. Fiskè v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108;

Julia V. Miller et al. v. *W. J. Shoene*, 276 U. S. 272, 72 L. Ed. 568.

Appellant claims that the judgment of the Supreme Court of Kansas, in case No. 31804 on its docket, sustaining and in effect affirming the order of the State Highway Commission of Kansas, is confiscatory and deprives it of its property without due process of law and denies it the equal protection of the laws contrary to the provisions of the Constitution of the United States, and particularly violates section one of the Fourteenth Amendment, and also the Fifth Amendment to the Constitution of the United States, and section eight, Article One of the Constitution of the United States.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the Acts of Congress above cited.

Respectfully submitted,

G. J. Neuner,
Chester J. Gerkin,
Attorneys for Panhandle Eastern Pipe Line Company.

FILE COPY

Office Supreme Court, U.
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

V.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF OF APPELLANT

G. J. NEUNER,
CHESTER J. GERKIN,
Counsel for Appellant.

Kansas City, Missouri,
November 23, 1934.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

V.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF OF APPELLANT

I

OPINIONS BELOW

The opinion of the Supreme Court of Kansas in this case appears at pages 16 to 30 of the printed record and is reported in 139 Kan. 185, 29 Pac. (2d) 1104. The opinion denying motion for rehearing appears at pages 31 to 32 of the printed record and is reported in 139 Kan. 849, 33 Pac. (2d) 151.

II

JURISDICTION

Paragraph 1 of Rule 12 has been complied with and a separate statement as to jurisdiction filed. Probable jurisdiction was noted October 15, 1934. Appellee does not controvert, and we submit, that Section 237 of the Judicial Code confers jurisdiction upon this Court.

The contention that the statute of Kansas here involved (Sec. 16, Ch. 225; Laws of Kansas 1929; Sec. 68-415 R. S., 1933 Supp.) violated the Fourteenth Amendment was made and presented in the first instance by the answer of the appellant (defendant below). The lower court expressly took notice of the federal constitutional question raised and decided it against the appellant. There is, therefore, involved herein the question of the validity of a statute of the State of Kansas on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest court of the state is in favor of its validity. Clearly, therefore, this court has jurisdiction of this appeal. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23.

III

STATEMENT OF THE CASE

This is an appeal from a peremptory writ of mandamus issued by the Supreme Court of Kansas in an original proceeding brought in said court against the

appellant, Panhandle Eastern Pipe Line Company, requiring it to proceed forthwith to make and complete the changes in its pipe lines and telephone lines in accordance with the orders, plans and specifications adopted and approved by appellee, the State Highway Commission of Kansas.

The appellant is a private corporation owning and operating a high pressure pipe line system and a telephone line in and through the State of Kansas and other states used in transporting natural gas in interstate commerce. At the points involved in this proceeding its lines are located upon private property, and not upon, along or across existing highways.

The appellee is an administrative agency, created as a body corporate by legislative act, and is by statute vested with the authority and charged with the duty to lay out, open, alter, vacate, and reestablish highways in the State of Kansas.

Appellee surveyed and laid out routes for certain new highways in the state. At six places the proposed routes of such highways intersect and cross the private rights of way owned by appellant and occupied by its gas transmission line and telephone line. (R. 3, 4.)

Rights of way for the pipe and telephone lines were acquired by appellant from the landowners in 1930 and the lines were constructed and laid during 1930 and 1931. (R. 10.) These right-of-way agreements granted to appellant the perpetual right to lay, maintain, alter, repair, operate and remove pipe lines, drips, gates, telephone and telegraph lines and all appurtenances

convenient for the transportation of oil, gas or other substances. (R. 13.) Subsequent thereto appellee acquired from the landowners rights of way for the construction of new public highways over these same lands. (R. 3.) The consent or permission of appellant to occupy and use its right of way for the construction of new highways across the same has not been procured by appellee either by grant or condemnation, nor permission been obtained to make changes or alterations in said lines.

Plans and specifications for the construction of these new highways were prepared and adopted by the appellee, showing that it was necessary in carrying out the work to make certain changes and alterations in the location of appellant's pipe and telephone lines; requiring in certain instances the removal thereof to a different location, in others the lowering of the pipe lines below drainage ditch level, and in still others the encasing of the pipes at points where the proposed highways will cross them. (R. 3.)

Purporting to proceed under statutory authority (Sec. 68-415, R. S. Kansas, 1933 Supplement), the appellee, through its representatives, verbally ordered appellant to make the above enumerated changes and alterations forthwith at its own cost and expense, the fair and reasonable cost of which is estimated to be not less than $5,460.00. (R. 4.) The appellant refused to comply with such order, and thereupon the appellee filed a verified motion in the Supreme Court of Kansas for a peremptory writ of mandamus to require the appellant to comply with its said order and

to proceed forthwith to make and complete in an efficient and workmanlike manner said changes in its lines in accordance with the plans and specifications adopted by the appellee for the construction of the highways in question. (R. 2 to 6.)

Upon the filing of said motion and on January 15, 1934, the court below issued its alternative writ of mandamus against the appellant in accordance with the prayer of appellee's motion, ordering that said changes be made forthwith or that appellant show cause on or before the 25th day of January, 1934, why the same should not be done. (R. 6 to 7.)

On January 18, 1934, appellant filed its answer to said motion. (R. 8 to 14.) In the answer all questions of fact were eliminated by appropriate admissions, and the sole issue in the case was resolved into the proper construction of the statute under which the appellee purported to proceed and the constitutionality of said statute when construed as contended for by the appellee. Appellant pleaded specially as a defense to said motion that if said statute be construed and interpreted to mean that appellee may lawfully require appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe and telephone lines located upon private property, it is unconstitutional and void under the provisions of the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereto, in that such construction of said statute will operate to take appellant's property without due process of law and will deny

to it the equal protection of the laws; and will operate to interfere unreasonably with appellant's business of transporting natural gas in interstate commerce, contrary to the commerce clause of the Constitution of the United States (Section 8, Article I). (R. 11 to 12.)

To this answer the appellee filed a motion for judgment on the pleadings. (R. 15.) The case was argued orally and in briefs filed and thereafter on March 10, 1934, decision was rendered in favor of appellee, allowing the peremptory writ of mandamus. (R. 16 to 30.)

In deciding the federal constitutional question raised against appellant, the court below said:

> "The answer duly pleaded violation of rights secured to the pipe line company by provisions of the Constitution of the United States relating to taking private property without due process of law, equal protection of the laws, and interstate commerce. Whatever burden on interstate commerce adjustment of the pipe line company's use of the highways to highway uses may occasion is purely incidental to proper exercise of the state's police power. Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with respect to apportionment of cost was not unreasonable. The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law. Therefore, none of plaintiff's constitutional rights was invaded." (R. 29.)

Thereafter on June 9, 1934, the court denied appellant's motion for rehearing (R. 31 to 32); and on July 6, 1934, issued final judgment against the appellant. (R. 33 to 35.)

The appeal to this Court was allowed by the Chief Justice of the Supreme Court of Kansas on August 27, 1934, or within three months after the judgment of that court became final. (R. 41 to 42.)

IV

SPECIFICATION OF ERRORS COMMITTED

The federal constitutional question involved herein is raised in appellant's three assignments of error, but for the purpose of brevity the first assignment of error only need be set forth here as it embraces the essential points involved. This assignment of error appears at pages 35 to 36 of the printed record. For the convenience of the court, we quote it:

> "The Supreme Court of the State of Kansas erred in holding and deciding that Sec. 16, Ch. 225, Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement), whereunder the State Highway Commission of Kansas, an administrative agency, ordered and required the defendant, Panhandle Eastern Pipe Line Company, at its own cost and expense, to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon, or across any existing state highway, in order to accommodate said rights of way and easements, pipe lines and telephone lines to the plans and specifications of said

highway commission for the construction of new highways across the same is, as applied to defendant, valid and constitutional; and in holding and deciding that the said order and requirement of said state highway commission made solely under and pursuant to said statute are valid and constitutional, and impose an enforcible and constitutional legal obligation on defendant to obey said requirement; and in ordering defendant by peremptory writ of madamus to obey and perform said order and requirement; the error being that the construction and interpretation of said statute in said manner makes said statute unconstitutional and void under the provisions of the Constitution of the United States and particularly Sec. 1 of the Fourteenth Amendment to said Constitution, in that said statute when so construed and interpreted and said order of the state highway commission made thereunder are unconstitutional, null and void and operate to take said defendant's property without due process of law and deny to it the equal protection of the laws; said statute, when so construed and interpreted, by its terms undertakes to delegate to the state highway commission, an administrative agency, the arbitrary power to make, and said commission did, pursuant solely to the supposed authority of said statute, make said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary *ex parte* decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said state highway commission, an enforcible and final legal duty to comply

with such order and perform the requirements of said state highway commission; thus depriving defendant of due process of law and taking its property without due process of law; that in said suit there was expressly drawn in question the validity of said statute of the State of Kansas when so construed and interpreted on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Kansas is in favor of its validity, which decision is hereby assigned as error."

V

SUMMARY OF ARGUMENT

The contention of appellant in this cause is that the statute (Sec. 16, Ch. 225, Laws of Kansas 1929, R. S. 68-415, 1933 Supplement) and the order of the state highway commission purporting to have been made under its authority are unconstitutional and void, being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Said statute provides that:

"Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway

commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of-way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid."

Under the construction placed upon this statute by the decision in this case, the State of Kansas has unlawfully delegated to its highway commission the arbitrary and exclusive power to order and require, in an *ex parte* manner, without notice, without evidence, without hearing, without opportunity or right of review or appeal, and without any proceeding in any recognized legal form which has the slightest color of due process of law, the appellant, at its own cost and expense, to remove, relo-

cate, change and alter the location and design of its pipe and telephone lines located upon private property, and not located upon, along or across existing state highways.

Appellant contends that the said statute, as construed by the court below in this case, is unconstitutional and void; and the order and requirement of the state highway commission, an administrative agency, made pursuant thereto is arbitrary and unlawful; that said statute and order deny to appellant rights secured to it by the Constitution of the United States, and takes its property without due process of law and without just compensation and denies to it the equal protection of the laws, contrary to the provisions of said constitution.

It does not matter that the material allegations of fact in appellee's motion for writ of mandamus were admitted or that the changes in question should be made in the interests of public convenience if the highways in question are constructed. The question which we urge is that the statute on its face, and, as authoritatively construed by the highest court of the state, unlawfully delegates to an administrative agency the power to take appellant's property without compensation, without due process of law, and denies to it the equal protection of the laws.

The challenged statute and the order of the highway commission made in this case are substantially the same as the statute of Virginia and order of its highway commission which were held to be unconstitutional and void in the recent case of *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190. In fact the Kansas statute is more objectionable than the Virginia statute, because the latter, as construed

by the Supreme Court of Virginia, did provide opportunity for review in the event the power is perverted or abused. Under the construction placed on the Kansas statute by the court below, the order of the commission made in a "star chamber" proceeding, without notice, without evidence, without hearing, in the absence of the appellant, and without following any procedure having the slightest color of due process of law, is valid and enforcible and is being enforced by a peremptory writ of mandate.

In upholding the statute and the order of the highway commission, the Court below relied principally upon the decision of this Court in *Erie R. R. Co.* v. *Public Util. Com.*, 254 U. S. 394. That case did not involve the question here presented. There the statute itself afforded every opportunity for notice, hearing, appeal and review on the merits. The requirement that the railroad stand a portion of the expense of eliminating a grade crossing was imposed only after notice and a great many hearings over a period of about two years, followed by a full review on the merits. The Erie and other railroad crossing cases are not analogous to the instant case, and are clearly distinguishable. The question of public safety is not involved in the case of pipe lines as it is in unprotected grade crossings over railroads.

The distinction is pointed out in *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 594, where this Court quoted with approval the following statement from an opinion of the Supreme Court of Minnesota:

"The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the Constitution from being divested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public."

It will not be contended by the appellee that its order and requirement does not operate to take appellant's property. The question is, can the highway commission take this property from the appellant without compensation? The statute does not provide for notice, hearing, evidence, or appeal by the property owner. We think it clear that the state is without power to take private property for a public use in such manner.

Appellant further contends that the statute, as construed, denies to it the equal protection of the laws. The act, of which Section 16 herein involved is a part, also provides for the elimination of dangerous railroad grade crossings. Section 15 thereof (R. S. 68-414, 1933 Supplement) provides in part, that:

"That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings where the lines of said railroad companies intersect state highways, when in the judgment of the state highway commission such viaducts,

tunnels, underpasses, bridges or grade crossings are necessary for the proper construction of the state highway system, for the safety of the general public, or for the elimination of a dangerous grade crossing: Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance of viaducts, tunnels, underpasses or bridges. * * *"

Before the commission may order and require railroad companies to construct viaducts, underpasses, etc., there must be present three necessary elements, to-wit: The necessity for the proper construction of the highway system; for the safety of the general public; or in the elimination of dangerous grade crossings.

With respect to railroads, the act provides for the division of the expense, between the railroad companies and the state highway commission in an equitable proportion; on the other hand, in the case of transmission lines, absolute, exclusive and arbitrary power is conferred upon the highway commission without the necessity of there being present any of the conditions above enumerated, and without any provision for the division of cost incurred.

Separate classification of transmission lines from railroads, requiring the former to bear the entire cost of changes made while the railroad companies are entitled to be reimbursed for a good part of their expense, is arbitrary, discriminatory and unreasonable, and such classification denies to the appellant the equal protection of the laws.

VI

ARGUMENT

The several assignments of error are embraced in the following point upon which appellant relies in this Court:

> "The order of the State Highway Commission of Kansas, an administrative agency, requiring appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon private property, and not located along, upon or across existing state highways, in order to conform the same to the plans and specifications of said commission for the construction of new highways, which said order was made without prior notice, without a hearing, without evidence, and without an opportunity for appeal and general review, and Sec. 16, Ch. 225 of the Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement) construed by the Supreme Court of Kansas herein as giving said commission the arbitrary power to make such order, and under the authority of which the commission's order was purported to have been made, operate to take appellant's private property without due process of law and without just compensation and deny to it the equal protection of the laws, in violation of the Fifth Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and that said order and said statute are therefore unconstitutional and void." (R. 44.)

(A) The Statute of Kansas, the Validity and Constitutionality of Which Is Challenged

The order of the appellee upon which this suit is based was made under the purported authority of Sec. 16, Ch. 225, Laws of Kansas 1929, above quoted.

The statute makes no provision for any hearing with respect to the convenience and necessity for the construction of new highways and the removal of pipe lines and telephone lines from lands to be occupied thereby; no provision for the taking of any evidence with respect thereto; no provision for notice to the parties affected; no provision for following any established legal procedure; no provision which would give a pipe line company an opportunity for a review of the reasonableness of the highway commission's order; no opportunity for appeal; and no provision for compensation to any extent. The statute as construed undertakes to give the highway commission absolute and arbitrary power as a forum of last resort to make this requirement, with or without assigned cause, based merely upon its administrative fiat, whim or caprice. We believe the appellee will concede that, as construed by the court below, the statute makes the commission's *ex parte* order and requirement absolute and final. The result of such order made in the manner aforesaid is the taking of appellant's property without any compensation and without due process of law.

(B) The Procedure Followed by the State Highway Commission

The appellee prepared its plans and specifications for the location and construction of certain new highways in the State of Kansas. The proposed routes of such highways cross the private rights of way of the appellant in several places. These plans and specifications showed that certain changes and alterations in appellant's pipe lines and telephone lines were necessary if appellee carried

out its purpose. Thereupon appellee delivered a copy of its plans and specifications to appellant with notice to conform its established lines thereto forthwith and at its own expense.

In adopting said plans and specifications and in making its order, appellee made no pretense of following any recognized form of legal procedure. No notice was given, no hearing held, no opportunity given appellant to be present or represented, no evidence taken or opportunity given to introduce evidence.

(C) The Constitutional Question

The constitutional question to be determined may be stated as follows: Is a state statute valid as against the charge that it violates the due process and equal protection clauses of the Fourteenth Amendment and takes private property without compensation, where such statute, as construed by the highest court of the state, delegates to the highway commission an administrative agency, the power, without notice to the parties affected, without a hearing, without following any form of legal procedure having any color of due process of law, and without giving the parties affected any right or opportunity for review, to determine arbitrarily in an *ex parte* manner and to order and require the company, at its own expense, to remove, relocate, change and alter the location and design of its established pipe lines and telephone lines located upon private property, and not located along, upon or across any existing state highway or other public property, in order to conform the location, design and construction of such lines to the plans and specifications

of the highway commission for the construction of new highways across the same, and to make such order final and conclusive, and to impose in said manner a final legal duty upon the company to obey the same?

The court below answered this question in the affirmative, and held that the statute does not authorize and the order of the commission does not involve a taking of property without due process of law. It is not clear from the opinion as to the reasoning upon which this conclusion is based, except that the taking is claimed to be justified under the police power.

(D) The Order of the Commission Involves a Taking of Property

It seems obvious that an order under which appellant is required to expend a minimum amount of $5,460.00 in making changes and alterations in its structures in order to conform the same to the plans of the highway commission for the construction of new highways does constitute a *taking* of private property. Except for the order and requirement of the commission, these changes and alterations need not be made. The lines are newly constructed, constitute a part of an established pipe line system and are improvements of a permanent nature. The outlay of this amount of money to make these changes and alterations in these newly built lines certainly takes appellant's property in a very real sense. This is as true in the case of a pipe line and telephone line as it is in the case of constructing overhead grade crossings and underpasses on railroads, which it is uniformly held constitutes a taking of prop-

erty. For example, in *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, decided December 4, 1933, this Court said (page 194):

> "Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority."

In *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, this Court, speaking through Mr. Justice Lamar, said (page 523):

> "The commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid."

Great Northern R. Co. v. *Minnesota,* 238 U. S. 340, involved an order of a railroad commission directing a railroad company to erect a 6-ton scale in its stockyards. This Court, speaking through Mr. Justice McReynolds, said (page 345):

> "Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances."

We think appellee's counsel will concede, as indeed they must, both upon reason and authority, that the enforcement of the commission's order does involve a taking of appellant's property. In the court below it was apparently conceded that a taking of private prop-

erty was involved, but the taking was sought to be justified under the police power of the state. The question, therefore, is whether in the taking of its property due process of law was afforded to appellant, and if not, whether a taking is justified under the police power.

(E) The Statute Does Not Afford the Parties Affected Due Process of Law and the Order of the Commission Was Made Without Due Process of Law, and Unlawfully Takes Appellant's Property for Public Use Without Compensation

The statute, as construed by the court below, purports to authorize the taking of private property for a public use without compensation. The lower court held that the statute applies not only to pipe and telephone lines actually located upon the rights of way of public highways, but also to those located upon private property. Under this decision, whenever the commission lays out a route across the country for the construction of a new highway and such proposed route intersects or crosses established pipe lines or telephone lines upon private property, it may summarily order the removal thereof or require costly changes and alterations therein at the owner's expense. And this it may order without prior notice, without a hearing, without taking evidence, and without the right of review by the party affected. Nothing need be done by the highway commission except "require the removal" to such other location on the right of way as it may designate. The commission's order that these things be done may be without assigned cause or reason and

its decision is final. No method is provided whereby the reasonableness of its order may be inquired into. The highway commission is the forum of last resort. No edict of a dictator could be more absolute and final.

The correct answer to the question here is not dependent upon the fact that it was necessary in the interests of public convenience (a) to lay out and construct the new highways in question; (b) that such highways be constructed at the particular points designated; (c) that the changes and alterations in the pipe lines and structures of appellant must be made if the highways are constructed. The test to be applied is whether or not the statute under which the appellee proceeded in this case, as construed, afforded appellant the rights guaranteed to it under the Constitution. Do the provisions of the Fourteenth Amendment permit the taking of appellant's property in the manner set forth in the statute as construed by the court below? A person may be deprived of his property by the state, but only after he has been afforded due process of law and just compensation has been made.

A fundamental requirement of due process of law is that the party whose property is to be taken or whose rights are to be affected must have prior notice thereof and a hearing or opportunity to be heard must be given.

In *Riverside & D. R. Cotton Mills* v. *Menefee*, 237 U. S. 189, 193, this Court, through Mr. Chief Justice White, said:

> "That to condemn without a hearing is repugnant to the due process clause of the fourteenth amendment needs nothing but statement."

In the oft-quoted case of *Stuart* v. *Palmer*, 74 N. Y. 183, 191, it was said:

> "A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

In *Turner* v. *Wade*, 254 U. S. 64, this Court held a Georgia statute unconstitutional under the due process clause of the Fourteenth Amendment where the county board of assessors, conformably with the statute, increased the valuation of property as returned for taxation without notice or hearing. In the opinion (page 67) it was said: "* * * due process of law requires that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of a tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings."

In *La Plata River & Cherry Creek Ditch Co.* v. *Hinderlider*, (Colo. 1933), 25 P. (2d) 187, 188, the Supreme Court of Colorado said:

> "Due process always implies a hearing, or trial, and judgment. * * * If private rights may be stripped from the citizen by state 'compacts,' by legislative fiat, by commissioners, by the uncontrolled discretion of state engineers, then 'due process' is dead in Colorado."

This principle of law is so well settled that citation of authority seems unnecessary for, as Chief Justice White said in the *Riverside Case, supra*, it "needs nothing but statement."

Nor would it matter that had due process of law been afforded in this case the result might have been the same, for the fact that appellant might not have had a defense upon the merits is not the determining factor. The vice in this statute and order is that due process of law is not provided for or afforded to those whose rights are affected.

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, it was contended that a Florida statute was not invalid because of failure to provide for notice, hearing, or opportunity to be heard since the result would have been the same. This contention was overruled, and in commenting thereon it was said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

In that case this Court quoted with approval from *Stuart* v. *Palmer*, 74 N. Y. 183, as follows:

> "It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard."

In the early case of *Rees* v. *Watertown*, 19 Wall. 107, this Court said:

> "The proceeding supposed would violate that fundamental principle contained in Chapter 29 of Magna Charta and embodied in the Constitution of the United States, that no man shall be deprived

of his property without due process of law—that is, he must be served with notice of the proceeding and have a day in court to make his defense. *Westervelt* v. *Gregg*, 12 N. Y. 209.

'Due process of law (it is said) undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' • • • Whether in fact the individual has a defense to the debt or by way of exemption, or is without defense, is not important. To assume that he has none and therefore that he is entitled to no day in court is to assume against him the very point he may wish to contest."

The doctrine of *Rees* v. *Watertown*, *Stuart* v. *Palmer*, and *Coe* v. *Armour*, *supra*, has been consistently followed.

In *Investors' Syndicate* v. *Porter*, 52 Fed. (2d) 189, 192, it was said:

"According to the weight of authority, although the owner may have been given notice and even a hearing, indicating a desire for fair play on the part of the officer, that is not sufficient to satisfy the constitutional requirement, unless the right to such notice and hearing is embodied in the statute."

In *Wuchter* v. *Pizzutti*, 276 U. S. 13, a New Jersey statute which failed to provide notice to defendant was held unconstitutional under the due process clause. In the opinion (page 24) it was said:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the stat-

ute. Not having been directed by the statute, it cannot, therefore, supply constitutional validity to the statute or to service under it."

Proceedings, although authorized pursuant to the police power, must conform to the requirements of due process which necessitates notice to the person affected, together with a hearing and findings based upon evidence.

In the case of *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, 44-45, this Court, speaking through Mr. Justice Brandeis, said:

> "An order based upon a finding made without evidence (*The Chicago Junction Case*, 264 U. S. 258, 263), or upon a finding made upon evidence which clearly does not support it, (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

The well-established principles of law for which we contend in this case were applied in the quite recent case of *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, wherein it was held:

> "A state statute which, as authoritatively interpreted, permits the state highway commissioner, without notice or hearing, to command a railway company to abolish any designated grade crossing and construct an overhead, when in his opinion necessary for public safety and convenience, and which makes his opinion final upon the question of public convenience and necessity unless what the Supreme Court of the state denominates 'arbitrary' exercise of the power can be shown, in which case relief might be had in equity, conflicts with the

due process provision of the fourteenth amendment against taking property without due process of law." (Syllabus)

The Southern Railway case is decisive of the case at bar.

If we assume *arguendo* that a state may require under given circumstances that pipe lines laid upon private property subsequently crossed by the route of a proposed highway be removed in the interests of public safety, the question still arises whether the statute under which the appellee proceeded meets the requirements of due process of law. The statute attempts to give an administrative board the power to make final determination as to whether the lines should be changed, removed, altered, etc., without notice, without a hearing and without evidence. The statute provides no method of review by any court. As stated by Mr. Justice McReynolds in the *Southern Railway Company Case, supra* (page 195), "The thing so authorized is no mere police regulation."

In its opinion the court below refers to the allegations in paragraph 5 of appellee's motion that it is necessary and in the interest of public safety that at the points of intersection the lines of appellant be changed, lowered, encased or moved.

It will be noted that appellee's motion does not allege, and appellant's answer does not admit, that these transmission lines constitute hazardous or dangerous instrumentalities to the traveling public. The lines as now installed are perfectly harmless and are not dan-

gerous in any sense. Except for the new highway plans of the appellee, no changes therein are necessary.

The railroad crossing cases cited and relied upon by the court below are without application. These cases are grounded on the proposition of imminent danger to the traveling public. Because of this great hazard and the well-known fact that many serious accidents occur at railroad grade crossings, the courts have held that in the exercise of the police power states may require railroad companies to eliminate these dangerous crossings. In many of such cases the railroad companies are required to bear a portion of the expenditure involved. Undoubtedly this is due to the fact that the railroads are benefiting by the change, since the structure replacing the grade crossing is a valuable asset to the company by reducing the possibility of liability for crossing accidents. It also becomes the property of the company and is included in a valuation for rate making purposes. Here the pipe line is obtaining no benefit whatsoever.

In *Re Elimination of Highway-Railroad Crossing*, 264 N. Y. 195, 202, 190 N. E. 344, 348, the Court of Appeals of New York said:

> "Referring again to the Grade Crossing Act, Sec. 3, Par. 2, we find how the cost is to be apportioned *after* the work is completed. • • •
>
> This act prescribes, as it says, a full and complete scheme for removing the danger at grade crossing. • • • It is all one purpose and one improvement, called an elimination proceeding, the cost of which is to be shared by the state, municipalities, and railroad as in the act provided."

The danger to the traveling public is the basis upon which these railroad grade crossing elimination cases rest. In *Erie R. R. Co.* v. *Public Util. Commrs.*, 254 U. S. 394, 412, this Court, speaking through Mr. Justice Holmes, said:

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone, we well might hesitate. But the situation is one that always is dangerous."

In the case at bar the element of danger is not present. True, it was alleged in the motion that it was necessary and in the interests of public safety that the highways be constructed, and therefore necessary and in the interests of public safety and convenience that the changes in the lines be made. But it was never contended that these lines as now constructed constitute a dangerous agency or that the safety of the traveling public is endangered by the manner of their construction.

Pipe lines are not in the same category as railroads. It is common knowledge that many thousands of miles of oil, gas, and gasoline pipe lines, telephone and telegraph lines, water lines, etc., have been constructed and are in operation throughout the country; that these lines intersect, cross, and are laid upon the rights of way of public highways in many places. When properly constructed, such lines are never considered

dangerous. It is only because in this particular instance the proposed highways encounter these existing lines that the necessity for changes and alterations therein arises.

We have diligently searched and have been unable to find a single case where transmission lines of this type have been found to be dangerous in the sense that the state may declare them to be a nuisance and order their summary abatement under the police power as is done in the elimination of dangerous grade crossings. Pipe lines and telephone lines cannot reasonably be placed on the same footing with railroads as regards the subject matter of this action so that the state may require these changes to be made at appellant's sole cost.

Appellant has never contended, and does not now contend, that it may not be required, in a proper proceeding, to make changes and alterations in its transmission lines in order to enable the appellee to lay out, construct, and maintain its proposed new highways. But it does insist that it is entitled to reimbursement for the expense necessarily incurred in so doing.

The statute, of which Section 16 is a part, clearly contemplates that compensation shall be paid whenever any lands or interests or rights therein are taken for highway purposes. Section 14 thereof provides, in part:

> "That the state highway commission, in the name of the state, may acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain, to any lands or interest or rights therein, * * *. The right of eminent

> domain when exercised as herein provided shall be in accordance with the provisions of Article 1, Chapter 26 of the Revised Statutes of 1923, and in addition to the notice required therein all lienholders of record of the condemned land must also be notified."

The contention which appellant here makes is nothing more than what rational justice, equity and fairness requires. There is nothing in this case which requires the highway commission to exercise emergency and extraordinary measures. The commission might well have proceeded in the same manner as it does when acquiring other necessary rights and property in the construction of new highways, namely, to acquire them in the manner contemplated by the above-quoted statute—by purchase or the exercise of the right of eminent domain. There is little doubt that had the highway commission proceeded by way of condemnation, appellant would have been entitled to recover compensation. It was so held by the court below in a very similar situation. In *Cities Service Gas Co.* v. *Riverside Drainage District*, 137 Kan. 410, 20 Pac. (2d) 520 (decided April 8, 1933), it was said:

> "We conclude that the plaintiff was entitled to recover not only the value of the land actually taken, but the reasonable expense of the relocation of the pipe line made necessary by the improvement of the watercourse on the plans of the drainage district."

The contention that a state may not, under the guise of the police power, take private property for a public use without paying compensation is fully supported by

the following statement of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, 416:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch* v. *Boston*, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Our government has always stood as firm as the Rock of Gibraltar in the protection of private property. In *Lynch* v. *United States*, 292 U. S. 571, 579, Mr. Justice Brandeis observed:

> "The fifth amendment commands that property be not taken without making just compensation."

And in *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 689, this Court said:

> "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation."

We think the following statement of Judge Hutcheson in the recent case of *Hulen* v. *City of Corsicana*, 65 Fed. (2d) 969, 971, 972, Circuit Court of Appeals, Fifth Circuit, is sharply applicable here:

> "Appellant urges that to say in the face of a constitution like ours, providing 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made' (Article 1, Section 17), a municipal corporation can saddle onto a railroad company a part of the necessary cost of establishing a waterworks system, to be operated for the private profit of itself and its inhabitants, is to run into the ground both the doctrine of public interest and police power, in order 'in the interest of the city's necessities' to shift its burden onto the shoulders of the railroad company. * * *
>
> We agree with appellant. No reason suggests itself to us why a railroad company should be compelled to contribute to the cost of constructing municipal waterworks which the city built and is profitably conducting as a proprietary enterprise. The facts as found establish that the expenses imposed upon the railroad company were incurred entirely in the interests of the city and its inhabitants. If the property which the city flooded had been owned by a private citizen or corporation, no one would question that it could not be made to contribute to

the city by assuming the burden here imposed. We think it goes without saying that neither may the railroad company be made to contribute to the project."

(F) The Statute and the Order of the Commission Deny to Appellant the Equal Protection of the Laws

In sustaining the order of the highway commission, the court below held that:

> "Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with respect to apportionment of cost, was not unreasonable."

Comparison of the provisions of Sections 15 and 16 of the statute in question discloses the following differences in requirements between *transmission lines* and *railroads*:

Section 15, which deals with the elimination of grade crossings on railroads, provides that the highway commission's power and authority to compel railroad companies to construct, etc., viaducts, etc., is dependent upon: (a) necessity for the proper construction of the state highway system; (b) the safety of the general public or the elimination of a dangerous grade crossing. Provision is made for the division of the expense between the railroad companies and the state "in a fair and equitable proportion."

Like provisions are not contained in Section 16 of the act, which deals with removals of transmission

lines "now upon state highways." It is apparent that transmission lines have been singled out and arbitrary power conferred upon the highway commission to require costly changes in existing structures (which may be more expensive than railroad viaducts, underpasses, etc.) without the necessity of there being existent any of the elements which must be present in the case of railroads. Nor is provision made for the division of the expense between the highway commission and the transmission companies, as is done in the case of railroads.

If, as the court below said, "Transmission lines of all kinds * * * are on the same footing with railroads with respect to grade crossings," then why are transmission lines classified separately and a burden imposed upon them which is not imposed upon railroads? Why must the highway commission give consideration to the several factors above enumerated when dealing with railroads and not in the case of transmission lines? Why must it bear a fair and equitable proportion of the expense in the one case and not in the other? Why may it require costly changes, alterations and removals in transmission lines without assigned cause or reason, while in the case of railroads the element of danger to the public must be present? Is it reasonable to require payment of compensation to the one and not to the other? In the final analysis, are railroads so different from pipe lines that separate classification is justified?

We submit that this Court knows judicially that railroads, in operating their fast-moving trains across highways, are inherently more dangerous and constitute more

of a hazard to life and property than do stationary transmission lines. We contend that a classification which favors railroads as against transmission lines is arbitrary, discriminatory and unreasonable, and denies to the latter the equal protection of the laws.

While reasonable classification may be made without doing violence to the equal protection clause of the fourteenth amendment, if a classification is made, it must rest upon some fundamental difference which bears a reasonable and just relation to the thing in respect to which the classification is made. As it has been often held, "arbitrary selection can never be justified by calling it classification." There is no fundamental difference between requiring a railroad to construct an underpass at a grade crossing and requiring a transmission company to encase its pipe lines laid under the highway.

The subject of legislative classification was fully considered and discussed by this Court in the leading case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. We quote the following pertinent excerpt from the opinion (page 558):

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state,

> even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In that case this Court quoted with approval the following from *Barbier* v. *Connolly*, 113 U. S. 27, 31:

> "The fourteenth amendment * * * undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, * * *."

In *Quaker City Cab Co.* v. *Commonwealth of Pa.*, 277 U. S. 389, 400, this Court held unconstitutional and void a statute which imposed a tax on *corporations* engaged in the business of transporting passengers or freight while *individuals* engaged in the same business were not taxed, and said that while the equal protection clause does not detract from the right of the state justly to assert its taxing power or prevent it from adjusting its legislation to differences in situation, or forbid classification in that connection, "but it does require that classification be not arbitrary, but based on a real and sub-

stantial difference having a reasonable relation to the subject of the particular legislation."

It is submitted that the classification made in this case between railroads and transmission lines does not rest upon any difference which bears a reasonable and just relation to the thing in respect to which the classification is made, and that the imposition of heavy burdens upon transmission companies not imposed upon railroads under like circumstances and conditions amounts to arbitrary selection and is not proper classification.

(G) The Statute, As Construed, Cannot Be Upheld As a Valid Exercise of the Police Power

The court below upheld the challenged statute upon the theory that it conferred upon the highway commission the right to exercise the police power of the state to make public travel on the highways safe. While a number of decisions are cited in support of its holding, in none of them was the power exercised in such summary manner and without affording due process of law as was done in this case.

While we recognize that under some circumstances private property may be taken or destroyed in the interests of the common good by summary proceedings without notice, hearing or compensation, we submit that instances where this may be done are strictly limited and are the exception. They usually involve emergencies, dire necessity, imminent danger or the property taken or destroyed is of such little value that the cost of condemnation would exceed it. Private property may not be taken or destroyed under the guise of the police power. There

must be grave reasons and urgent necessity which will not permit following customary legal proceedings.

Illustrative of the circumstances under which property may be taken or destroyed in summary proceedings is the case of *Lawton* v. *Steele*, 152 U. S. 133, wherein this Court said (page 140):

> "But where the property is of little value and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagration; destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes."

Also *Cities Service Gas Co.* v. *Riverside Drainage District*, 137 Kan. 410, 20 Pac. (2d) 520, in which the court below said:

> "Defendant seeks to justify the instruction given by the court on the theory that the taking and appropriation was an exercise of the police power of the state and that the plaintiff holds its property, which is charged with a public interest, subject to an exercise of the police power and that in such cases private rights may be invaded without compensation. The rule applies in some emergencies, such as the destruction of property to avert impending peril, as to prevent the spreading of fire, the washing out of a highway during a freshet or flood and the abatement of a nuisance. • • • Property cannot be appropriated without compensation under the guise of the police power. If the requirements are unreasonable and arbitrary and operate to deprive an owner of his property within the par-

view of the law of eminent domain, they will not be upheld."

Every state power, including the police power, is limited by the inhibitions of the Fourteenth Amendment against the taking of property without due process of law.

In the case of *Southern Ry. Co.* v. *Virginia, supra,* it was contended that the statute was enacted under the police power of the state and hence not subject to the standards applicable to legislation under other powers. This contention was dismissed by this Court which held that such claim "conflicts with the firmly established rule that every state power is limited by the inhibitions of the fourteenth amendment."

In the language of Mr. Justice Butler in *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 508:

> "The state may not by any of its agencies disregard the prohibitions of the fourteenth amendment."

The legislature in this instance has not found or declared that pipe lines or telephone lines, even on existing highways, are dangerous or that the maintenance thereof makes the highways unsafe and that public welfare demands their removal, much less the maintenance of such lines on private property subsequently crossed by highways newly laid out. The act does not require that such lines as are located on the highways must be removed therefrom, or that such lines constitute a nuisance which should be abated; but merely provides

that the commission may require their removal to such other location on the highway as it may designate. The act is completely silent as to pipe lines and telephone lines located on private property which in the future may be intersected by new highways.

Instances of the exercise of the police power of a state include the power to impose assessments for benefits, to regulate common carriers and public utilities, to establish drainage districts, and to regulate business. Whenever any of these powers of the state are exercised due process of law must be provided and afforded to the party affected thereby. Broad as is the taxing power, a state cannot delegate to an administrative board or officer the power to make a final assessment without notice or hearing and without right to contest the assessment by the parties affected. The statute itself must require notice and hearing and it is insufficient that notice or a hearing be granted as a matter of favor. *Security Trust & S. V. Co.* v. *Lexington*, 203 U. S. 323; *Central of Georgia Railroad Co.* v. *Wright*, 207 U. S. 127; *L. & N. Railroad Co.* v. *Central Stockyards Co.*, 212 U. S. 132.

In the regulation of public utilities as to rates and service, the states act under the police power. In such cases the power of the state is subject to the inhibitions of the Fourteenth Amendment. If a rate or charge fixed by legislative action, whether by the legislature itself or by its constituted agency, amounts to a taking of property without due process of law, the legislation or orders will be set aside. If rates or charges are fixed without

notice or hearing, the action is a denial of due process of law.

For example, in the case of *Chicago, M. & St. P. Railroad Co.* v. *Minnesota,* 134 U. S. 418, this Court passed upon and declared unconstitutional a Minnesota statute which gave the railroad commission of the state the power to fix rates to be charged by the railroad company or to "find that any schedule of charges filed with it by a railroad company is in any respect unequal or unreasonable" and then compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable." In the opinion it was said (page 457):

> "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The case of *Wichita Railroad & L. Co.* v. *Public Utilities Commission,* 260 U. S. 48, further illustrates the limitations upon the power of a state in delegating legislative powers or police powers to an administrative agency. This Court, speaking through Mr. Chief Justice Taft, said (page 59):

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in

> the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action."

The police power of the states, with respect to interstate commerce, was delegated to the federal government in the Constitution of the United States. The police power of the federal government, under the commerce clause, is limited by the provisions of the fifth amendment the same as are the reserved powers of the states under the Fourteenth Amendment. This Court has uniformly held that under the limitations of the Fifth Amendment congress is without power to authorize the Interstate Commerce Commission to regulate or fix rates without notice, without hearing and without sufficient evidence.

In *Interstate Commerce Commission* v. *L. & N. Railroad Co.*, 227 U. S. 88, in discussing this subject in connection with an order of the commission reducing rates, it was said (page 91):

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes un-

der the Constitution's condemnation of all arbitrary exercise of power."

While it is true that the state has broad police power to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its total wealth and prosperity, whenever such powers are exercised, except in grave emergency and dire public necessity, it must afford the persons affected due process of law and pay just compensation before their property is taken or destroyed.

The rule contended for, we feel, is sufficiently established by the cases already referred to, but attention is invited to the following decisions which further illustrate the limitations imposed by the Fourteenth Amendment in the delegation to administrative agencies of the right to act under the police power of the state in the taking or destruction of private property.

Yick Wo v. *Hopkins,* 118 U. S. 356.
Parsons v. *District of Columbia,* 170 U. S. 45.
Tracy v. *Ginsberg,* 205 U. S. 170.
Eubank v. *Richmond,* 226 U. S. 137.
Wagner v. *Leser,* 239 U. S. 207.
Embree v. *K. C. & L. B. District,* 240 U. S. 242.
United States v. *Cohen Gro. Co.,* 255 U. S. 81.
Truex v. *Corrigan,* 257 U. S. 312.
Adkins v. *Children's Hospital,* 261 U. S. 525.

In this case the Legislature of Kansas has not declared or indicated any necessity for summary pro-

ceedings in the taking of property. There is no emergency and no imminent danger to be averted by such procedure as followed by the highway commission.

VII

CONCLUSION

It is submitted that the challenged statute, as construed by the court below, unconstitutionally delegates to the highway commission the arbitrary power to take private property without notice or hearing, without evidence, without opportunity or right of appeal or review, and without following any procedure having the slightest color of due process of law, and without compensation; that the separate classification of railroads and transmission lines by which the former may be compelled to make changes in their structures only when it is found necessary for the proper construction of the state highway system, the safety of the general public, or the elimination of dangerous grade crossings, and then only upon condition that the commission bear a fair and equitable proportion of the expense involved, while in the case of transmission lines none of these factors are considered and no compensation provided, is an unreasonable classification and amounts to arbitrary selection, which operates to deny to transmission companies the equal protection of the laws; that as so construed said statute is repugnant to the letter

and spirit of the due process and equal protection clauses of the Fourteenth Amendment; and that said statute and order made thereunder are unconstitutional and void. The judgment of the court below should be reversed.

Respectfully submitted,

G. J. NEUNER,
CHESTER J. GERKIN,
Counsel for Appellant.

Kansas City, Missouri,
November 23, 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE STATE HIGHWAY COMMISSION OF KANSAS,
Appellee.

APPEAL FROM THE SUPREME COURT OF KANSAS

REPLY BRIEF FOR APPELLANT

G. J. NEUNER,
CHESTER J. GERKIN,
Counsel for Appellant.

Kansas City, Missouri,
February 5, 1935.

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Sec. 7415, Kansas General Statutes, 1915	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE STATE HIGHWAY COMMISSION OF KANSAS,
Appellee.

APPEAL FROM THE SUPREME COURT OF KANSAS

REPLY BRIEF FOR APPELLANT

Jurisdiction

Appellee concedes that this Court has jurisdiction to determine the Federal constitutional question presented. The case presents but a single issue, namely, the validity of the statute (and the order of appellee made pursuant thereto) which is challenged on the ground that, as construed by the court below, it violates the due process clause of the Fourteenth Amendment by authorizing the taking of private property without compensation, notice, hearing, or right of review.

Statement of the Case

Appellee makes a "re-statement" of the case at pages 2 to 9 of its brief. While in the main the facts actually set forth in this statement are correct, there are certain inaccuracies which we desire to point out; also, it contains argument and inferences with which we do not agree.

On page 3 of its brief appellee states:

> "Appellee instituted this action as an original proceeding in mandamus in the Supreme Court of the State of Kansas, alleging that the Highway Commission was about to and proceeding to reroute certain state highways and to widen certain other state highways and that it was necessary and in the interest of public safety that at certain points within the state where newly acuired state highway rights of way intersected or crossed the privately owned pipe lines and pole line easements of the appellant, that such lines should be altered and changed by lowering, encasing or removing the same to the outer portion of the newly acquired highway right of way."

This statement is inaccurate in that it fails to point out that appellee's motion for a writ of mandamus was based upon its prior order requiring appellant to relocate and change its transmission lines. The action was grounded upon that order.

Appellee's statement at the top of page 7 of its brief reading:

> "The opinion of the Kansas Supreme Court determines and the record involves not more than two questions, viz. First, whether the statute referred to was intended to apply only to highways existing prior to the poles, piers, wires and abutments or whether it was intended to apply equally to highways to be laid out constructed in the future."

is not strictly correct. The court below determined that the statute was intended to apply to private rights of way

and transmission lines intersected and encountered in the construction of new highways, as well as to such lines actually located upon existing highways.

On pages 8-9 of appellee's brief it is said:

> "As has been stated, the Supreme Court commended the parties on their collaboration in this matter and in the elimination of all questions of fact and appellee submits that it has not been granted the opportunity of alleging and stating the notice, proceedings and hearings which were in fact had before the commission. Appellee here states and frankly confesses that the statement is entirely outside the record—that by reason of the conferences and discussions held between the parties herein the Highway Commission adopted and directed certain changes in the plans proposed by its engineers resulting in a saving to the pipe line company of the sum of $3,205.00."

And on page 28:

> "It was upon consideration of the first two questions that the Commission adopted changes in the proposed plan which resulted in a saving, according to appellant's estimate, of the sum of $3,205.00 and while dehors the record, we frankly state that had not the Commission done this the Supreme Court of Kansas would undoubtedly have ordered the same changes of plan."

While we dislike to refer to matters outside the record, in order that this Court may not be misled we feel that a more complete statement with respect to this subject matter is warranted. When the appellee's plans and specifications were delivered to appellant with directions to comply therewith they embraced a total of seven separate projects for changes in its transmission lines. One of these projects, which was withdrawn by appellee before the mandamus action was commenced, required changes in appel-

lant's pipe line located more than two hundred feet away from appellee's proposed highway. In order to comply with appellee's order it would have been necessary that a portion of appellant's pipe line be lowered into and embedded in solid rock at an estimated cost of $3,205.00. Before its mandamus proceeding was filed appellee withdrew the part of its order relating to this one particular project. So far as the record shows and we are advised no discussion or conference of any kind was had between the parties before appellee made its original order.

The commendation of the parties by the lower court had reference to the preparation of the motion for writ of mandamus and the answer thereto wherein issues of fact were eliminated in order to present a purely legal question. This comment had no reference to anything either in or outside the record regarding notice or hearing afforded the appellant prior to the issuance of appellee's order.

On page 9 of its brief appellee says:

> "Appellant's claim of lack of an opportunity to be heard in fact results in a denial to the Highway Commission of the right to be heard on the question of the sufficiency of its proceedings. This is the only possible denial of a hearing now contained in this record."

This is a novel view regarding the procedure to be followed by an administrative body. In order to give the court below jurisdiction and entitle it to grant the relief prayed for, it was of course necessary that appellee's motion for a writ of mandamus contain all allegations of fact requisite to show that the order sought to be enforced was duly and lawfully made. In the words of Mr. Chief Justice Hughes in *Panama Refining Co.* v. *Ryan*, — U. S. —, decided January 7, 1935:

> "• • • due process of law requires that it shall appear that the order is within the authority of the

officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

ARGUMENT

1. Nature of the Action in the Court Below

It must be borne in mind that this action primarily involved the question of whether the order of the appellee, alleged to have been made under the authority of Section 16, Chapter 225, Laws of Kansas, 1929, imposed upon the appellant a legal duty to comply therewith.

Under the statutes of Kansas a writ of mandamus may be issued to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station. The statute under which this action was brought in the court below is Section 60-1701, R. S. Kansas, 1923, providing as follows:

> "The writ of mandamus may be issued by the supreme court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion."

Appellee's statement (page 10 of its brief), that the action was brought for the purpose of obtaining a construction of the challenged statute, is not entirely accurate. The action was instituted by appellee for the purpose of enforcing its order. The construction and validity of the statute was drawn into question in a consideration of the force, effect and legality of said order. The very nature of the

action shows it was brought to compel the performance of an act which it was contended the law specially enjoins as a duty. Otherwise a mandamus proceeding could not have been maintained.

The action was commenced in the court below after appellee had made its order upon appellant requiring it to make certain changes and alterations in its transmission lines located upon private property. Certain basic facts shown by the record should be kept in mind:

(1) Appellant's transmission lines are located upon private property, and not upon public highways.

(2) Appellant's rights of way upon which its lines are located were acquired long prior to the time when appellee acquired its rights of way for highway purposes.

(3) Appellant's transmission lines constitute property and improvements of a permanent nature.

(4) Appellee acquired from the owners of the fee its rights of way for highway purposes subsequent to and with knowledge of appellant's prior rights of way.

(5) Appellee has neither purchased nor condemned appellant's easements or the transmission lines located thereon so as to subordinate the same to highway uses, nor has it procured the consent of appellant to make changes in said lines and to occupy said easements.

Notwithstanding these undisputed facts, appellee took the position that under the authority of the challenged statute it could occupy appellant's premises without obtaining permission to do so or condemning the property. Appellant urged that the challenged statute could not properly be construed as giving such arbitrary authority to the appellee, and that if it were so construed it would be violative of the

due process and equal protection clauses of the Fourteenth Amendment.

The action was brought and maintained upon the theory that the order of appellee imposed upon appellant a final legal duty to comply therewith. In paragraph 9 of said motion it was alleged (R. 4):

> "That the Highway Commission has ordered and directed said Pipe Line Company to make such changes in the location and design of its lines aforesaid, all as contemplated and provided by R. S. 1931 Supp. 68-415, and has heretofore and on or before December 1, 1933, furnished said company with all necessary plans, specifications and information necessary to enable said pipe line company to proceed to make, accomplish and perform all said changes required by the improvement of said state highways, but that said Pipe Line Company ever since has and now fails, neglects and refuses to conform therewith."

In paragraph 11 it was further alleged (R. 5):

> "That the Pipe Line Company's failure and refusal to make the changes in its lines hereinabove specified in accordance with the orders and rulings and plans and specifications of the Highway Commission are without legal right or authority."

In its prayer for relief, appellee moved and prayed (R. 5):

> "Now, therefore, the Highway Commission moves and prays this court for an alternative writ of mandamus herein ordering and directing the said Pipe Line Company to forthwith move, change, lower and encase its lines at the points hereinbefore stated in accordance with the orders, plans and specifications adopted and approved by the Highway Commission or to show cause why the same should not be done. Plaintiff further prays that upon final hearing that the alternative writ be made peremptory."

The alternative writ of mandamus issued by the court below directed that the changes in appellant's lines be made and completed "in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission * * *." (R. 6)

The peremptory writ of mandamus issued by the court below as its final order in this case provides (R. 33-34):

> "It is therefore by the court, considered, ordered, and adjudged, that the Panhandle Eastern Pipe Line Company be and it is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike manner the changes in its lines hereinafter specified in accordance with the orders, plans, and specifications, adopted and approved by the State Highway Commission of Kansas for the improvement of the highways hereinafter referred to: * * *."

It is, therefore, clear that the object of the action was the enforcement of appellee's order. The only issue that was or could have been considered in the court below was the validity of this order.

In the answer filed by appellant it was alleged in paragraph 5 that (R. 8-9):

> "Answering the allegations of paragraph 5 of said motion, defendant admits that plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the State of Kansas, and for such purposes has procured rights of way for such improvements from the land owners, but states that plaintiff has not procured consent or permission from the defendant to cross the private rights of way and easements owned by defendant and occupied by its pipe line and telephone line nor to make changes in said lines, although plaintiff's rights of way were procured and acquired with full knowledge of the interests and rights of defendant; * * *."

In paragraph 9 appellant stated (R. 9):

> "Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, * * *."

It was further alleged in said paragraph 9, in substance, that appellant's transmission lines are all located upon private property, and not upon any public highway; that the rights of way under which its lines were constructed were acquired from the owners of the fee long prior to the acquisition by appellee of its rights of way, and that appellee had acquired its rights of way with full knowledge of appellant's interest and estate in said lands and of the existence and operation of said transmission lines over and through said lands; that if the challenged statute be given the construction and interpretation placed thereon by appellee it is unconstitutional and void as violative of the due process and equal protection clauses of the Fourteenth Amendment.

The issues thus joined in the court below raised no material questions of fact, but did present the issue of law upon which the parties differed: first, the proper construction of the challenged statute under which the order was made; and, second, its validity against the charge that it violates the due process and equal protection clauses of the Fourteenth Amendment if given the construction contended for by appellee.

That the statute, as construed, does violate the due process clause is shown in appellant's main brief on the authority of an unbroken line of decisions of this Court. Appellant's position is fully supported by the quite recent decision in *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, cited and discussed in appellant's original brief. Appellee seeks to distinguish that case from this one by asserting

(page 15 of its brief) that the statute there involved "provided that the Highway Commissioner could without notice or hearing determine the requirement of public safety for the elimination of a grade crossing." The statute contained no such provision. The Virginia statute was completely silent with respect to notice and hearing, just as is the Kansas statute involved here. This Court reversed the State court because, as construed, the statute denied due process of law by failing to provide for notice, hearing and right of review.

The statute must provide for notice. The case of *Security Trust Co.* v. *Lexington*, 203 U. S. 323, cited by appellee, does not support its contention. There the action involved the merits of the assessment of certain taxes, and the statute specifically provided for notice to the taxpayer. In its opinion this Court said (page 333):

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute."

2. Nature of the Property which Is Being Taken and Injured is Such that Due Compensation Must be Paid

The transmission lines of appellant are located upon privately owned easements, which were acquired before and are superior to any rights obtained from the owners of the land by appellee. Copy of a typical right of way grant to appellant appears in the record at page 13. The rights appellant acquired thereunder are "to lay, maintain, alter, repair, operate and remove pipe lines and from time to time parallel pipe lines, drips, gates, telegraph and telephone lines and all appurtenances convenient for the trans-

portation of oil, gas or other substances.'? It was under this form of grant that appellant's transmission lines were constructed and are being maintained. Under this grant appellant has a substantial interest in the land in question. The transmission lines constructed on this private right of way are part of an extensive pipe line system of great value. This property cannot be taken for public use without appellant's consent, except by condemnation, and then not without compensation.

On page 49 of its brief appellee says:

> "Were the pipeline company the owner of the fee of the land which it occupies, it might occupy a different position. As it is, it does not assume the burdens of a landowner but occupies easements for its own purposes only. This being so and because the simultaneous occupation of the same land is not inconsistent the private rights of the pipe line company are not dispossessed, they are being merely regulated in order that the traveling public be not endangered."

This is a most extraordinary contention. It is elementary law that the rights of the owner of an easement are paramount, to the extent of the grant, to those of the owner of the soil; as also to a grantee of any subsequent easement. In *United States* v. *Welch*, 217 U. S. 333, this Court held that a private right of way is an easement and is land and that when taken for public purposes the owner is entitled to compensation.

In *United States* v. *Wheeler Tp.*, 66 F. (2d) 977, 983, the United States Circuit Court of Appeals, Eighth Circuit, said:

> "That easements such as these highways are 'property' is not open to dispute. They are interests in land—incorporeal hereditaments. *Mackey* v. *Harmon*, 34 Minn. 168, 171, 172, 24 N. W. 703; *Warner* v. *Rogers*, 23 Minn. 34, 38; *United States* v. *Big Horn Land &*

Cattle Co., 17 F. (2d) 357, 365 (C. C. A. 8); *Combs* v. *Brickhouse*, 201 N. C. 366, 160 S. E. 355, 356; *Boland* v. *Walters*, 346 Ill. 184, 178 N. E. 359, 361; *Eastman* v. *Piper*, 68 Cal. App. 554, 229 P. 1002, 1004; 19 C. J. 863, 29 C. J. 540. Therefore, these highways cannot be taken and their use as such destroyed without compensation under the Fifth Amendment."

In *Village of Bradley* v. *New York Cent. R. Co.*, 296 Ill. 383, 129 N. E. 744, it was held that:

> "In a proceeding by a village to establish a local sewer improvement upon the right of way of a railroad company holding an easement from the original dedicator of the land, where it appeared that a sewer which was to be constructed under the center of the track would interrupt traffic and entail expense in removing the track and replacing it after the work was completed, damages for the interruption of the railroad's business and moving and removing the tracks were recoverable." (Syllabus)

In *Lawlor* v. *Southern Pac. Co.*, (Cal.) 178 Pac. 165, the court said:

> "The law is settled that damages may be recovered for an interference with an easement of right of way whereby property of plaintiffs has been depreciated in value."

In *City of Springfield* v. *Springfield Consol. Ry. Co.*, 295 Ill. 234, 129 N. E. 82, it was held that:

> "An easement is property, and is protected by constitutional provision that private property cannot be taken or damaged without just compensation." (Syllabus)

In *Missouri Pacific Railroad Company* v. *Manson*, 31 Kan. 337, 341, 2 Pac. 800, 803, the court below in passing

upon the nature of the interest of a railway company in its right of way used the following pertinent language:

> "Under condemnation proceedings, a railroad company acquires the exclusive use of the land condemned, so far as it is necessary for railroad purposes, and the original landowner has no right to go upon the land or construct fences thereon, if his action interferes with the use of property condemned for railroad purposes."

In *Paterson N. & N. Y. R. Co.* v. *Mayor, etc., of City of Newark,* 61 N. J. Law 80, 38 Atl. 689, it was held that:

> "The laying out of a highway across a railroad is a taking of the company's property for public use, and entitles it to compensation therefor." (Syllabus)

Also, in *Morris & E. R. Co.* v. *City of Orange,* 63 N. J. Law 242, 43 Atl. 730, the same court held that:

> "Upon the laying out of a highway across the tracks of a railroad company, the latter is entitled to compensation for the use of the locus in quo for a highway crossing." (Syllabus)

In *City of Chicago* v. *New York, C. & St. L. R. Co.,* 216 Fed. 735, the Circuit Court of Appeals, Seventh Circuit, held that the railroad company had a vested right in the streets and could not be required to move its tracks without compensation.

In the rather recent case of *The City of Wichita* v. *Wichita Union Terminal Ry. Co.,* 127 Kan. 855, 275 Pac. 171, a similar statute to that involved here was construed by the court below contrary to the contention of appellee. In that case the city of Wichita enacted an ordinance which declared it to be necessary for the safety and protection of the public that a subway and tunnel be constructed and a pedestrian and vehicular trafficway opened

through the elevated tracks of the railroad company at Waterman Street, and directed the same to be constructed at the expense of the railroad company. The city street had never extended over the railroad right of way at that point. The railroad declined to build such structures and the city commenced a proceeding in mandamus to compel it to comply with the ordinance. In denying relief to the city the court said:

> "There was no evidence on behalf of plaintiff that the street ever extended across the railroad right of way. Because of that fact the trial court took the view that the city could not by ordinance compel defendant to open up a street through its right of way and to construct a subway through its elevated track at that point at great expense to itself and without compensation. In this view we concur. Cities are given authority to condemn private property for public use, and the procedure for doing so, as applied to opening streets, is also provided by statute (R. S. 26-201). In doing this, damages incident thereto must be paid. *City of Osceola* v. *C., B. & Q. R. Co.* (C. C. A.), 196 Fed. 777; *A., T. & S. F. R. R. Co.* v. *Shawnee* (C. C. A.), 183 Fed. 85; *M., K. & T. Ry. Co.* v. *Okla.*, 271 U. S. 303, 70 L. Ed. 957. Plaintiff relies on the authority conferred upon cities by R. S. 12-1633 and 13-1903, but a reading of these sections discloses that they apply only when the railroad is upon or across a public street. Here the railroad had built its improvements on its own right of way and not upon or across any city street." (127 Kan. 857, 275 Pac. 172)

In the present case appellant, the same as the railroad company in the above-mentioned case, had built its improvements on its own rights of way and not upon or across a highway. In the *Wichita* case the statute applied to city streets; in this case to state highways. The reasoning of the above decision is sound, has never been overruled, and should have been followed in the case at bar.

As pointed out in our main brief at pages 29-32 the statute in question provides that the highway commission may acquire by purchase or by the exercise of the right of eminent domain any lands or interests or rights therein and other property necessary for the construction of the state highway system. There is no more reason for appellee taking the property of a pipe line company without compensation than that of a farmer along a projected highway route. As stated by Mr. Justice Roberts in *Liggett Co.* v. *Lee*, 288 U. S. 517, 536: "Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons."

Appellant's contention that its easement may not be taken, damaged or impaired without compensation is fully supported by the authorities. In Lewis on Eminent Domain (3rd ed.), § 223, the prevailing rule with respect to the rights of owners of easements which are taken or impaired for a public use is stated as follows:

> "Such easements cannot be destroyed or impaired by public works without compensation. This principle is well illustrated by the case of *Arnold* v. *Hudson River R. R. C.* (55 N. Y. 661). Arnold was the owner of a factory, with the right to take water from a pond at some distance from his factory and convey it thereto, over the land of another, in a race way or trunk, either over or under the ground. For this purpose Arnold had built and had in use a trunk some six feet above the ground. The defendant, having acquired title to a portion of the intervening lands, took down the trunk, laid it beneath the ground and its tracks, and then raised the water by means of a penstock into the old trunk. Arnold permitted this to be done on the assurance of the company's agent that it would make the water course as good as formerly, and also keep the same in repair. The water power was impaired, and the expense of repairs was increased. It was held that the easement was property within the constitution, and

that the plaintiff was entitled to compensation. The principle of this case will apply to all easements."

3. Appellant is Not Confined to the Argument Advanced in the Court Below on the Same Federal Question

Appellee argues appellant should not be permitted to urge that the statute is violative of due process in a procedural sense because this proposition was not emphasized in the argument in the court below. This point is not well taken. The record presents and we urge but a single federal question. That question is whether the challenged statute, as construed by the court below, violates the due process and equal protection clauses of the Fourteenth Amendment.

In the case of *Dewey* v. *Des Moines,* 173 U. S. 193, two separate and distinct federal questions were argued in this Court. In the court below but one of these questions had been raised. The second question was raised for the first time after the case reached this Court. In passing upon whether this additional question would be permitted to be urged upon appeal, it was said (pages 197-198):

> "Reference to the opinion of the supreme court of the state shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.
>
> Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."

We submit that there has been presented but the one Federal question and that we should be permited to advance

as many reasons as we wish to sustain our position. The argument that the statute is violative of the due process clause of the Fourteenth Amendment in a procedural as distinguished from a substantive sense is but another ground or reason advanced to show its invalidity.

4. Appellee's Point that "The Requirements of Notice and Hearing are to be Implied from the Provisions of the Statute" is Not Well Taken

Appellee asserts (brief, p. 11) that under a rule prevailing in Kansas statutes which fail to provide for notice and an opportunity to be heard are only unconstitutional when by their terms they prohibit the interpolation of notice; and that when a statute permits such interpolation a requirement for notice may be implied. Appellee's contention is in direct conflict with numerous decisions of this Court, a number of which are cited in appellant's main brief.

Under the established rule of this Court the right to notice and hearing must be embodied in the statute itself, and it is insufficient that notice and a hearing be granted as a matter of grace or favor. The only case in this Court relied upon by appellee which has any possible bearing on this point is *Detroit Ry. Co.* v. *Osborn*, 189 U. S. 383, which held that where the objection that a statute does not provide for notice is taken for the first time in this Court, *and the record shows that notice was actually given*, it is not open to plaintiff in error to complain that the statute did not provide for such notice. This decision is without application here because the record does not show that notice was given or hearing held.

Practically all the Kansas cases cited by appellee in support of its contention on this point appear to involve the validity of tax assessments. The so-called "leading" case relied upon is *Gilmore County Clerk* v. *Hentig*, 33 Kan. 156.

The reason for the adoption of the rule is stated by the court below in the later case of *Hill* v. *Johnson County*, 82 Kan. 813 (cited by appellee at page 19 of its brief). Immediately following the statement quoted by appellee, the court used the following pertinent language (page 819):

> "In the opinion in *Railroad Company* v. *Abilene*, *supra*, it was said:
>
> 'Provision for notice and a hearing need not be made in the statute by express words. It may be implied. In reality the courts simply read the provision into the statute in order to uphold taxation schemes against the Fourteenth Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law. This was done in the case of *Gilmore, County Clerk*, v. *Hentig*, 33 Kan. 156. * * * '"

The statute involved in *Tatlow* v. *Bacon*, 101 Kan. 26, cited on page 19 of appellee's brief, provided as follows:

> "An execution against the person of the debtor, except as prescribed in Section 511, can be issued only when the same is allowed by the supreme court, the district court, or any judge of either, upon being satisfied, by the affidavit of the judgment creditor or his attorney, and such other evidence as may be presented, of the existence of one or more of the particulars mentioned in Section 522." (Kansas Gen. Stat. 1915, Sec. 7415)

In commenting upon this statutory provision the court below said (page 28):

> "According to this provision a judicial hearing is contemplated, as the execution against the person cannot issue until a court or judge thereof shall determine upon evidence that the statutory grounds for such an order exist. It is not issued as a matter of course upon an application, but before making such order the su-

> preme court or the district court or a judge of either must be satisfied by the evidence presented in support of the application. The requirement that evidence shall be presented to the satisfaction of a court or judge clearly implies a hearing, and other provisions of the Code require notice of applications for an order of this kind."

The court below did not predicate its decision in *Railway Co.* v. *Railway Commissioner,* 85 Kan. 229 (cited on page 20 of appellee's brief), on this ground (implied notice). In its opinion (page 232), the court said:

> "However, it is not necessary to place the decision on either of the grounds mentioned, as complete statutory authority for the giving of notice to the railway companies appears to have been provided by the legislature, and also that in pursuance of that authority notice was in fact given."

In *Toombs* v. *Citizens Bank,* 281 U. S. 643, cited on page 21 of appellee's brief, the record showed that fifteen days' notice was actually given. Under these circumstances this Court said (page 647):

> "'In the face of this record, we cannot assume either that notice was not required by the law of the state or that that actually given was insufficient."

The case of *Paulson* v. *City of Portland,* 149 U. S. 30, cited on page 22 of appellee's brief, involved the validity of certain improvement taxes. The ordinance in question provided for the appointment of viewers to estimate the proportionate share of the cost which each parcel of property should bear. It named a place at which the viewers should meet, and directed them to hold stated meetings so that all interested persons might appear and be heard. The viewers gave notice by publication in the newspapers of the city of the time of their first meeting. Because of these

provisions of the ordinance and the fact that notice had actually been given the ordinance was upheld.

The case of *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 369, from which appellee quoted on page 21 of its brief, is not analogous. The statute there involved provided that for failure to pay a franchise tax a foreign corporation would forfeit its right to do business in the State. This Court said that in order to hold the act constitutional, until the State held otherwise, it would assume that the forfeiture applied only to the doing of intrastate business and would not assume in advance that the State would attempt to forfeit the right of the railroad to carry on its business in interstate commerce for failure to pay the tax.

The remaining cases cited by appellee have no possible application and lend no support to its contention.

5. The Statute Does Not Provide for Judicial Review of the Action of the Commission

Appellee argues that under the provisions of section 3 of the act (printed as an appendix to its brief) judicial review of the commission's orders is provided for, and that the court below in an earlier case has so held. (Brief, p. 25) Said section has no application or relation to the authority of the Commission to require the removal of transmission lines located upon private property intersected by newly projected state highways. It has reference only to substantial changes *in the state highway system* and provides that changes therein shall only be made when public safety shall require. The several cases cited and discussed by appellee deal with the question of the necessity for making substantial changes in the existing highway system and hold that a judicial review of the commission's decision on the question of the necessity for such changes is authorized. They have no bearing whatever upon the question of mak-

ing changes in existing private property encountered in the construction of new highways.

We are not here concerned with the necessity for changes in the highway system. The propriety of building the new highways is not questioned. The thing of which appellant complains is that in carrying out its program for new highways appellee undertakes to confiscate and take its property without compensation.

Appellant is not asking this Court for an interpretation of the challenged statute as stated by appellee. (Brief, p. 30.) That has been done by the court below. The matter presented to this Court is whether the statute as construed is violative of appellant's constitutional rights. That the construction placed upon the statute operates to take private property without compensation is not questioned. That it is a taking without due process of law, we believe, has been clearly demonstrated.

6. Appellee's Contention that "Appellant Has in Fact Been Granted a Full and Complete Judicial Review" Is Untenable

Appellee argues that appellant was granted a full and complete judicial review in the court below. As already stated, the action in the lower court was a mandamus proceeding to compel the performance of an act which appellee claimed the law enjoined as a duty. Appellee contended that its order and requirement was authorized under the terms of the challenged statute. Appellant defended upon the ground that the order and the statute were violative of its constitutional rights.

The statute does not provide for a review of the commission's order by any court—no right of appeal, certiorari, writ of error, or other mode of review is granted.

As stated above a mandamus action was brought by appellee to enforce its order. An alternative writ was served

upon appellant requiring it to proceed forthwith to make the changes in its lines "in accordance with the orders, plans and specifications adopted and approved by the state highway commission for the improvement of the highways therein referred to, or to show cause, on or before the 25th day of January, 1934, why the same should not be done." (R. 6) Such a proceeding does not constitute a hearing or judicial review of the commission's order.

Particularly applicable is the case of *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, 236, wherein this Court, speaking through Mr. Justice Harlan, said:

> "But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. *Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice.* Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (Italic ours)

The following language of Mr. Justice McReynolds in *Ohio Valley Company* v. *Ben Avon Borough*, 253 U. S. 287, 289, (dealing with a statute for the fixing of public utility rates by a commission) is equally applicable here:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

7. Appellee's Claim that "The Statute Is a Valid Delegation of the Police Power" Is Not Justified

Under this heading appellee seeks to justify the decision of the court below on the authority of certain decisions of this Court. However, none of these cases involved the question of confiscation or taking of property located on private rights of way. For example, in the case of *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, which is typical of the cases upon which appellee relies, the transmission lines were laid in existing streets in the first instance and, of course, were subject to regulation in the interest of public health and safety.

We agree with appellee's statement on page 39 of its brief, that:

> "A railroad grade crossing presents an entirely different problem for public regulation than does a pipe line buried beneath the highway."

Being entirely different, it is obvious that the so-called grade crossing elimination cases upon which appellee and the court below relied have no application. Particularly are they inapplicable to a pipe line buried beneath the ground upon a private right of way.

Apparently the court below proceeded upon the assump-

tion that it was unnecessary for appellee to purchase or condemn appellant's right of way notwithstanding its priority was expressly alleged in the answer and admitted by appellee's motion for judgment on the pleadings. In its opinion the court said:

> "With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, established and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission." (R. 27)

The distinction between *police power* and *eminent domain* is pointed out in 12 *Corpus Juris* at page 905, where it is said:

> "The police power is to be clearly distinguished from the right of eminent domain; and the distinction lies in this, that in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is damnum absque injuria or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power."

On page 15 of its brief appellee states that in the court below appellant's argument was based upon a confusion of the rights and duties of the parties in an action under the police power and one under the right of eminent domain. The confusion was on the part of the appellee and

has been carried into the decision of the lower court. In its opinion the court said (R. 21):

> "What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe."

The prime error of the court below lies in the unwarranted assumption that appellant's transmission lines are on the highways and thus subject to regulation under the police power, when, as a matter of fact, they are on private easements which have not been dedicated to highway uses either by grant or condemnation. The appropriation of these easements and the lines located thereon to highway uses without first purchasing or condemning them cannot be accomplished under the guise of the police power. The fact that the easements are not wholly destroyed, but merely impaired to the extent that appellant loses its right of dominion over them and is required to expend a minimum of $5,460.00 in order that it may continue to use them for its purposes, does not change the rule of law that "private property may not be taken for a public use without compensation."

A forceful answer to appellee's contention that appellant's property may be taken without compensation under the police power is contained in the case of *Chicago, B. & Q. R. Co.* v. *Public Utilities Commission,* 69 Colo. 275, 276-279, 193 Pac. 726, 728-729, wherein the court said:

> "The question for determination in this case is as to the right of the Public Utilities Commission, by an order, without any proceeding in condemnation, to open a street across a railroad right of way.
>
> The argument of counsel for the respondent is, in brief, as follows:
>
> The state has delegated to the commission a part of the police power, that is, the right to regulate rail-

road companies in various matters, including the putting in of street crossings, etc.

That being so, the order to put in a crossing is within the authority of the commission and the order should be affirmed.

The defect in this argument is due to a failure to distinguish between the police power, and the right of eminent domain; between the power to compel the installation of crossings, and the power to take land for streets, or other public purposes.

A crossing may be ordered put in under the police power of the state; land may be taken for a street only by the exercise of the right of eminent domain.

Throughout the brief for respondent, this misapprehension appears. Cases are cited to the effect that crossings may be ordered in, at the expense of the railroad companies, and that uncompensated obedience to a regulation, enacted for the public safety under the police power of the state, is not a taking of property without just compensation; with all of which we agree. *Those cases have, however, no bearing on the question at issue.* Indeed, the commission seems to have first fallen into this error of supposing that the power to require the construction of crossings was equivalent to the power to take land for a roadway across the tracks.

* * * * * * *

It is manifest, then, that the discussion of the police power is wholly beside the mark. No case is cited, and we find none, which supports the contention of counsel.

* * * * * * *

The fact that property may be damaged or destroyed, without compensation, under the police power, has no bearing upon this controversy. Here the property is to be *taken* and devoted to a public use, the railroad company retaining a right to its use,

qualified by the right of the public to a new use. Property consists not in the thing said to be owned, but in the right to dominion over it, control of its use, and disposition. The thing owned may be tangible or intangible, a fee in land or an easement in it. A railroad company across whose tracks a street is opened loses the exclusive control,—which is property,—over the part devoted to street purposes, and hence a part of its property is 'taken.' Its right to compensation for that part is a natural right, protected by express constitutional provisions. Such is the declaration of the United States Supreme Court in the case last cited." [*C., B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226.] (Italics ours)

In *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 413, this Court, speaking through Mr. Justice Holmes, said:

"As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

Had the highway commission condemned or acquired from the appellant the right to construct the highways over and across its rights of way and permanent structures, we might be able to understand the conclusion that these lines are located upon established and existing highways, and thus perhaps subject to reasonable regulation under the police power. But this it did not do. It was claimed by appellee, and was so held by the court, that since new or different rights of way need not be procured by appellant, appellee could occupy the same and compel the changes in

appellant's structures without compensation. This contention and holding is decisively answered by the following language of this Court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410:

> "If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

Appellant has never contended that the state may not delegate its police power to an administrative agency to regulate in a reasonable manner transmission lines laid in or upon existing streets or highways. However, that is not the question here. In this case the lines are not laid upon public highways but on private property. This property has not been conveyed to the state either by grant or condemnation. What the commission seeks to do is to take this property under the guise of the police power without compensation. Until such time as the state has acquired a right and title superior and paramount to that of the pipe line company, its right to construct a highway across this land is subject and inferior to appellant's right to maintain and operate its established transmission lines.

The proposition is advanced by appellee, and apparently followed by the court below, that notwithstanding the seeming lack of due process of law and the apparent clash with the Fourteenth Amendment, the challenged statute was enacted, and the appellee is proceeding, under the police power of the state, and therefore the statute and order are

not subject to the standards applicable to legislation under other powers. The contention conflicts with the firmly established rule that "every state power is limited by the inhibitions of the Fourteenth Amendment." (*Southern Ry. Co.* v. *Virginia, supra*)

Appellant's transmission lines are not a nuisance subject to summary abatement by the state. The distinction is pointed out in *Mugler* v. *Kansas*, 123 U. S. 623, 669, where this Court said:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

The observation of Mr. Justice McReynolds in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, is sharply applicable to the facts in this case:

> "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

In *Olson v. United States*, 292 U. S. 246, 254-5 this Court said:

> "The statement in that opinion [*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326] that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes."

In *Columbus Gas Co.* v. *Comm'n.*, 292 U. S. 398, 404, Mr. Justice Cardozo said:

> "It [the state court] put its judgment upon the ground that the statute of Ohio defining the powers of the Commission and the method of appraisal makes no provision for depletion (Ohio General Code, Sec. 499-9 to 499-13), and that the statute, and nothing else, gives the applicable rule. We may assume in submission to the holding of that court that the amortization allowance must be rejected if the rate making process is to conform to the rule prescribed by statute, irrespective of any other. That assumption being made, the conclusion does not follow that the statutory procedure may set at naught restrictions imposed upon the states and upon all their governmental organs by the Constitution of the nation."

In its main brief (page 43) appellant cited, without extended discussion, among other decisions of this Court, the case of *Yick Wo* v. *Hopkins,* 118 U. S. 356. We believe the rule of that case is particularly applicable to this one. There this Court held an ordinance of the city of San Francisco void because it conferred upon an administrative board arbitrary power without prescribing a yardstick by which the power may be limited.

Under the challenged statute, as construed, the highway commission may order and require the removal and relocation of transmission lines at the owner's expense, even though they be located upon private property. The commission's order may be with or without assigned cause or reason. Since the statute makes no provision for notice, hearing, or review, and prescribes no standard, rule or yardstick for the guidance of the commission, it clearly falls within the rule of Yick Wo and analogous cases. It is apparent that the statute undertakes to delegate naked arbitrary power upon the appellee.

Conclusion

Apellant concludes, as in its main brief, that the challenged statute, as construed by the court below, and the order of the highway commission made thereunder, unconstitutionally takes its property for a public use without compensation and without due process of law.

Respectfully submitted,

G. J. NEUNER,
CHESTER J. GERKIN,
Counsel for Appellant.

Kansas City, Missouri,
February 5, 1935.

(5934-C)

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The Supreme Court of the United States

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OF APPELLEE.

OPINIONS BELOW.

The opinion in the Supreme Court of Kansas in this case is reported in 139 Kan. 185, printed in the record at pages 16 to 30. The opinion on motion for ~~reprint~~ rehearing is reported in 139 Kan. 849 and printed in the records on pages 31 to 32.

JURISDICTION.

Appellee does not wish to contest the jurisdiction of this Court to determine any of the Federal Constitutional questions presented by the record.

STATEMENT OF THE CASE.

In fairness to the Supreme Court of the State of Kansas, appellee, the State Highway Commission feels that a re-statement of this case is advisable in order to avoid any possible confusion as to the facts involved in the record herein and the issues presented, argued, considered and determined in the court below.

Appellee, the State Highway Commission, is an agency of the state, created and existing for the establishment, construction and maintenance of the state highway system. Appellant, the pipeline company, owns, maintains, and operates a pipeline for the transportation of natural gas in interstate commerce. For its own purposes it maintains a private telephone line. Its lines enter the state approximately at the southwest corner and leave the state just south of Kansas City, Kansas. Its lines are located on private easements acquired from the various owners of the lands traversed, except where they cross and intersect the public highways. The State of Kansas makes no charge for the use of its highways for uses of this nature, and it has been held that such transmission lines are a lawful use of the public highways. State v. Weber, 88 Kan. 175, 182; State v. Natural Gas Company, 71 Kan. 508, 510; LaHarpe v. Gas Company, 69 Kan. 97.

Section 16, chapter 225 of the Laws of 1929, provides that whenever any person shall construct or maintain poles, piers, abutments, pipelines, along, upon, or across any state highway, such poles, wires, piers, abutments, pipelines and other fixtures shall be located upon that

part of the right of way of the state highway designated by the State Highway Commission. The Commission is authorized and empowered to require the removal of such poles, piers, and abutments, wires and pipelines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the State Highway Commission shall designate. The full text of the act is attached as an appendix to this brief.

Section 3 of the same act designates the state highway system and continues:

> "* * * And provided further, That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein shall be made except when the public safety shall require such substantial change."

Appellee instituted this action as an original proceeding in mandamus in the Supreme Court of the State of Kansas, alleging that the Highway Commission was about to and proceeding to reroute certain state highways and to widen certain other state highways and that it was necessary and in the interest of public safety that at certain points within the state where newly acquired state highway right of way intersected or crossed the privately owned pipelines and pole line easements of the appellee, that such lines should be altered and changed by lowering, encasing or removing the same to the outer portion of the newly acquired highway right of way. The Supreme Court of Kansas granted an alternative writ of mandamus directing the appellant to make the changes alleged to be necessary and in the interest of

public safety, or to show cause why the same should not be done. The defendant filed its answer in which it stated:

"6. Answering paragraph 6, defendant admits the location and general nature of the changes in defendant's pipelines and telephone lines, which changes should be made if said new highways are constructed and opened to the public."

"8. Answering paragraph 8 of said motion, defendant admits that the relocation, removal or encasing of defendant's said pipe lines and telephone lines as requested by plaintiff may be done and accomplished without the acquisition of any other or different rights of way by defendant, but alleges that if defendant complies with the orders and demands of plaintiff it will be compelled to incur costs and expenses in the sum of not less than $5,460, the payment of no part of which plaintiff is willing to assume."

"9. Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, and alleges that plaintiff has ordered that said changes be made at defendant's own cost and expense and without cost or expense to plaintiff; admits that plaintiff has furnished defendant with plans and specifications and all information necessary to make, accomplish and perform said changes, and admits that defendant has failed and refused to conform therewith; admits that it has notified plaintiff that it would not make the changes in its said lines as ordered by plaintiff until plaintiff has indicated its willingness and intention to reimburse defendant for the reasonable cost of all required material and labor costs and expenses incurred by the defendant in making the changes in its said lines in

conformity with the plans and specifications of said plaintiff. Defendant states that plaintiff's orders requiring defendant to make such changes at such enormous cost and expense to defendant are unreasonable, arbitrary, and void. Defendant denies that the provisions of sec. 68-415, Revised Statutes of the state of Kansas, 1931 Supplement, have any application to changes, relocations, or removals of pipe lines and telephone lines located upon privately owned rights of way not located along, upon, or across any existing state highway." (R. 9, 10)

"Defendant further alleges that if sec 68-415 R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States, and particularly the fifth amendment, and sec. 1 of the fourteenth amendment to the constitution of the United States, in that such construction will operate to take defendant's private property without due process of law and will deny to defendant the equal protection of the laws; that to require defendant to make such changes at its sole cost and expense will operate to unreasonably interfere with defendant's business of transporting natural gas in interstate commerce contrary to the commerce clause of the constitution of the United States, sec. 8, art. 1, of said constitution." (R. 11, 12)

"11. Defendant denies that its rights in its rights of way involved herein are servient and subject to the needs, demands, and requirements of the plain-

tiff to the extent that defendant may be required to expend enormous sums of money in making changes and relocations in its said pipe lines and telephone lines to suit the needs and demands of plaintiff without being duly compensated therefor. Defendant states that its said pipe lines and telephone lines are located upon privately owned rights of way as aforesaid, (fol. 16) and are not located along, upon, or across any existing state highways, and that to require defendant to make such changes and relocations at its own cost and expense will constitute a taking of defendant's private property without due process of law contrary to the provisions of the constitution of the United States as aforesaid; that defendant is ready and willing, and has so notified plaintiff, to make the changes, relocations, and removals as required by the plaintiff, in accordance with its plans and specifications, upon proper commitment for reimbursement by the plaintiff for the reasonable cost and expense which defendant will incur in making such changes and relocations as requested and demanded by plaintiff under its said plans and specifications, but that said plaintiff denies that it is obligated or liable to reimburse defendant for such costs and expenses or any part thereof, and insists that defendant make such changes at its own cost and expense." (R. 12)

The Kansas Supreme Court stated at the beginning of its opinion:

"The parties have collaborated in a most commendable manner in preparation of the motion for the alternative writ and the answer. Issues of fact have been eliminated, and the Highway Commission's motion for judgment on the pleadings raises the legal question on which the parties differ." (R. 17)

The opinion of the Kansas Supreme Court determines and the record involves not more than two questions, viz. First, whether the statute referred to was intended to apply only to highways existing prior to the poles, piers, wires and abutments or whether it was intended to apply equally to highways to be laid out and constructed in the future. Second, as stated by appellant in its answer (R. 11):

> " *** that if sec. 68-415, R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon, or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States."

The question of due process, argued, considered, and determined was, therefore, one of substantive law and the Supreme Court of Kansas construed the statute to apply to new highways as well as highways formerly established and held that the requirements of the statute were a valid exercise of the police power. There was never any question raised as to due process in the procedural sense. The motion for the alternative writ of mandamus contained no allegations as to what notice had been given to the pipeline company before the determination by the commission that the changes were necessary and in the interest of public safety. The an-

swer made no attempt to challenge the sufficiency of the notice that was in fact given. This question appears in the record for the first time in appellant's assignment of errors at page 36 of the record whereat it is said:

> "and said commission did, pursuant solely to the supposed authority of said statute, make, said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary ex parte decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said State Highway Commission, an enforcible and final legal duty, to comply with such order and perform the requirements of said State Highway Commission thus depriving defendant of due process of law and taking its property without due process of law;" (R. 36)

This statement is a bold statement of alleged fact made without foundation in the record. As has been stated, the Supreme Court commended the parties on their collaboration in this matter and in the elimination of all questions of fact and appellee submits that it has not been granted the opportunity of alleging and stating the notice, proceedings and hearings which were in fact had before the commission. Appellee here states and frankly confesses that the statement is entirely outside the record—that by reason of the conferences and discussions

held between the parties herein the Highway Commission adopted and directed certain changes in the plans proposed by its engineers resulting in a saving to the pipeline company of the sum of $3205.00. The proceedings of the Commission may have been to some extent of an informal nature but their sufficiency have not been questioned. It is not the intention of the appellee to here contend, and it did not contend below, that notice and an opportunity to be heard were not necessary under the law here involved, and the rules of statutory interpretation which have been adopted by the Supreme Court of Kansas. That Court having held in a long line of cases hereinafter cited that a statute is not unconstitutional for failure to provide notice but that notice must in fact be given and that the statute is unconstitutional only where it prevents the interpolation of notice to the parties involved.

Appellant's claim of lack of an opportunity to be heard in fact results in a denial to the Highway Commission of the right to be heard on the question of the sufficiency of its proceedings. This is the only possible deniel of a hearing now contained in this record.

SUMMARY OF ARGUMENT.

Appellant seeks throughout its brief to create the impression that the order of the Highway Commission was an ex parte affair made without notice and without evidence. This is denied by appellee. The whole contention in this regard is based on an issue of fact and is not contained in the record and was not presented, argued,

or determined, in the court below. It should be entirely disregarded herein. The action was brought for the purpose of obtaining a construction of the statute, Section 16, Chapter 225, Laws of Kansas, 1929, referred to in the pleadings of the parties as set out in the record as R. S. 1931 Supp. 68-415. No attempt was made to question the sufficiency of the proceedings before the commission and the first attempt of this nature is made in this court. The question of whether or not the statute violated the inhibitions of section 1 of the 14th amendment to the Constitution of the United States by reason of the fact that the statute did not in terms provide the method, time or manner of notice to and hearing of the complaints of pipeline and poleline companies which might be affected was not presented below. However, because the principal issue below involved the 14th amendment in the sense of a taking without just compensation and because the question of the sufficiency of the statute may be first considered in this court where the alleged defect is patent we assume that the question may be a proper one for the consideration of this court.

No complaint is made in the record or in the pleadings or briefs below that the order of the Commission violates the constitutional inhibitions of the 14th amendment, except the challenge to the validity of the statute standing alone. Therefore the only issue in this court is the validity of the statute. Appellant makes the point that it is denied the equal protection of the laws by reference to section 15 of the act which separately classifies railroad companies and provides that the Highway

Commission may contribute not to exceed 50% of the cost of structures designed for the elimination of grade crossings. Thus the only two real questions in this case may be stated briefly as follows: (a) Do the provisions of Section 16 deny to appellant due process of law because of their failure to state in terms the method, time, and manner of notice to and of hearing of complaints made by persons affected by the orders of the Commission made under the provisions of this section and, (b) Whether the terms of Section 15, and 16, in separately classifying railroads from pipelines and other transmission lines, violates constitutional inhibitions by denying the equal protection of the laws.

(a) Notice and the opportunity for hearing:

The Supreme Court of Kansas has held in a long line of decisions that statutes of this nature are not necessarily unconstitutional because of their failure to provide notice and an opportunity to be heard. The court holding that such notice is in fact required by the paramount law embodied in the 14th amendment to the constitution of the United States and that such statutes are only unconstitutional where, by their terms, they prohibit the interpolation of such notice; that when the terms of a statute so permit, such a requirement for notice and hearing may be implied. Some states have adopted more technical and narrow rules of statutory construction but this rule has been so firmly established in Kansas that it must be considered as a part of the law here to be considered. This court has in a number

of instances cited hereafter applied the same rule of statutory construction in similar cases, following the elementary proposition that if a statute will bear two constructions one within and the other beyond the constitutional power of the law making body, the courts should adopt that which is consistent with the constitution because it is presumed that the Legislature intended to act within its scope of authority. Because such rule of statutory construction is so firmly established within the jurisdiction of the Kansas Supreme Court, it cannot be denied that notice and an opportunity to be heard under this statute are absolutely required either by the commission or in the process of judicial review. Even if a judicial review were not available to appellant, any failure of the commission to provide such notice and hearing would go to the validity of the commission's order and not to the constitutionality of the statute.

We therefore conclude that the statute is not subject to the criticism suggested.

Appellant assumes in its argument that the statute denies to it the opportunity and the right to judicial review of the action of the Commission. We submit that Section 3 of the Act is a restraint upon the authority of the Commission and creates a jurisdictional fact upon which the validity of the action of the Commission must rest. This section provides that no substantial change shall be made in the state highways unless required by the public safety. The act makes no pretense of authorizing the commission to make a final determination of this fact and the Supreme Court of

Kansas in three different cases hereinafter cited has sustained, twice, in injunction proceedings and once in mandamus, the right of parties litigant to question the necessity in the interest of public safety. It is upon this fact together with the reasonableness of the order of the commission and the plan to be adopted for highway improvements which constitute the only real questions upon which any aggrieved or even affected party could possibly expect to be heard, in any proceeding to be had before the Commission. Whether an order of an administrative body is unreasonable and therefore arbitrary has always been a judicial question. Questions of statutory interpretation and constitutionality of statutes have likewise always been judicial questions. Appellant or any party similarly situated is therefore entitled to be heard upon any of these questions in any court of competent jurisdiction whether it be in a federal or state court. Appellee submits that in fact appellant has had a full and a complete judicial review in this case and before no lesser body than the Supreme Court of the State of Kansas, and that it had therein the right and the opportunity to present any defense it may have seen fit. This action was there begun as an original proceeding and the jurisdictional fact of the necessity in the interest of public safety was alleged and admitted. Appellant could have challenged the form, formality or substance of any part of the proceedings had by the Commission or of the notice given. This it did not do. It says in this court for the first time and on page 4 of its brief that the appellee, " *** through its representa-

tives, verbally ordered the appellant to make the above enumerated changes and alterations forthwith at its own cost and expense. *** " It would seem that this is a late date to first make this sort of a statement, having had the right to a judicial review and having been in fact granted a judicial hearing in the Supreme Court. Appellant is in an odd position in contending here for the first time that it has been denied such an opportunity.

(b) Equal protection:

The court below said in its opinion at page 29 of the record and in disposing of the question of whether or not appellant had been denied the equal protection of the laws by reason of the fact that Section 15 of the act provides that the Commission may contribute not to exceed 50% of the cost of railroad viaducts, underpasses, etc.: "Transmission lines of all kinds are on the same footing and are on the same footing with railroads with respect to grade crossings. Separate classifications of railroad underpasses and viaducts, permitting exercise of the Highway Commission's discretion with reference to apportionment of cost was not unreasonable." We submit that the Supreme Court of Kansas is absolutely correct and that no serious controversy can arise in this case upon this question. We feel that the decisions hereinafter cited fully justify the position taken by the State Supreme Court.

Beginning at page 37 of appellant's brief, it makes a separate point under the sub-head, "The statute as construed cannot be upheld as a valid exercise of the police

power." This question was one of the two contentions of appellant in the court below, however, in this court it lapses into its argument based upon its dehors statement that the order of the Commission was without notice and without hearing. Its principal argument below was built around Cities Service Gas Company v. Riverside Drainage District, 137 Kan. 410, cited at page 38 of its brief. The argument was based upon a confusion of the rights and duties of the parties in a proceeding under the police power and a proceeding under the right of eminent domain. The real question involved in the title is whether by the exercise of its police power a state may take private property in the sense herein involved without full compensation. This question occupies the greater portion of the opinion of the court below and for this reason we hereinafter cite a number of cases which we feel fully justify the position of the lower court.

THE REQUIREMENTS OF NOTICE AND HEARING ARE TO BE IMPLIED FROM THE PROVISIONS OF THE STATUTE.

This record and this appeal are undoubtedly influenced by the recent decision of this court in Southern Railway Company v. Virginia, 290 U. S. 190; 78 L. ed. 260, and this case seems to constitute the backbone of appellant's argument for a reversal. The case here involved is clearly distinguishable from the Virginia case. There the statute provided that the Highway Commissioner could without notice or hearing determine the requirement of public safety for the elimination of a grade crossing. As stated by this court at page 178:

> "He alone would be cognizant of the mental processes which begot his urgent opinion."

An appeal was provided to the State Corporation Commission but the scope of such appeal was the consideration of any possible modification of the plans for the construction of the grade crossing elimination structure. The Corporation Commission had no authority or jurisdiction to inquire as to the existence or non-existence of the fact, "that the public safety or convenience requires that the crossing be made *** above *** the structure of said railroad, etc." Here the statute makes no pretense of authorizing the highway commission to make any final determination of the necessity in the interest of public safety. In the Virginia case the statute was such that notice and an opportunity to be heard could not be implied or interpolated by any reasonable construction.

By the elimination of appellant's statement in the assignment of errors that "said commission did, pursuant solely to the supposed authority of said statute, make said order and requirement without previous notice, etc.," the question of due process in the procedural sense is narrowed to whether the statute is violative of the due process clause of the 14th amendment by virtue of its failure to provide the manner, time, and place of the notice to be served or the opportunity to be heard. This court said in Missouri Pacific Oil Company v. Fitzgerald, 160 U. S. 556, 575, speaking through Mr. Justice Fuller:

> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed upon in the court

below, but we may refer to such assignment by way of convenience to ascertain the contentions of plaintiff in error."

The Kansas Supreme Court has firmly adopted a rule of statutory construction which cannot be disregarded in any consideration of the sufficiency of the statute.

The leading case announcing this rule of statutory interpretation is Gilmore County Clerk v. Hentig, 33 Kan. 156, wherein it is said at page 171:

> "In the present case, the statutes do not require that any notice shall be given; hence the defendants in error, plaintiffs below, claim the statute purporting to authorize the construction of sewers and drains is unconstitutional and void, and therefore that no special taxes for the construction of sewers or drains can be levied; while the plaintiffs in error, defendants below, claim that the statute is valid, and that no notice of any kind is necessary. We do not agree with either of the parties. We think that the statute is valid, and still that a notice is required. Of course, if no other or paramount law required that notice should be given, then we would think that the statute would be sufficient within itself, and that no notice of any kind would be required; but we think there is another and paramount law, requiring a notice. This other and paramount law is embodied in the fourteenth amendment to the constitution of the United States, which provides as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Such a law is probably also embodied within some of the provisions of our own constitution, though not so clearly as in the said fourteenth amendment.

> As before stated, we think that the statute is valid, but nevertheless that notice of some kind must be given; but as the statute says nothing about a notice, the city evidently has a broad and almost unlimited discretion with reference to the kind of notice that may be given, and the manner in which it may be given."

This principle is applied in City of McPherson v. Hanson, 87 Kan. 769, a criminal prosecution for failure to pay a road tax, quoting from page 773:

> "When the tax became delinquent, and when the prosecution was commenced, a statute was in force giving the same authority to the city conferred by the statutes in effect when the ordinance was adopted. In this situation the ordinance remained in effect. It is true that neither the former law nor the ordinance required in terms a preliminary notice, yet it is probable that a reasonable notice would have been required by interpretation before a prosecution could have been sustained. The reasons for such an interpretation and policy upon which it is based are stated in Gilmore, County Clerk v. Hentig, 33 Kan. 156, 5 Pac. 781, and Railroad Co. v. Abilene, 78 Kan. 820, 98 Pac. 224. This policy was later established in the last enactment and the time to be given in the notice was definitely fixed. When the offense was committed and the case was tried this statute was in effect, and the court gave the appellant the benefit of its provisions by instructing the jury that proof of such notice was necessary.
>
> It will not be claimed that the appellant had a vested right to be prosecuted without a notice for the reason that none was required by the express terms of the statute or the ordinance. The notice, even if not required, was not injurious.

> The rights of the appellant were fully protected. He was subject to the tax and after due notice refused to pay it. This default subjected him to the prosecution."

Railway Company v. Abilene, 78 Kan. 820, is as follows:

> Syl. 5. "It is not necessarily fatal to a special-assessment statute that it does not contain an express provision relating to notice and a hearing. When the terms of the statute permit, such a provision may be implied."

In Tatlow v. Bacon (Rucker), 101 Kan. 26, an execution had been issued against the person of a debtor and the validity of the statute authorizing such procedure was challenged for want of a provision for notice. It is said:

> Syl. 3. "As the statute provides that before issuing an execution the court or judge must be satisfied from evidence produced that the statutory grounds upon which it may issue exist, it is obvious that the legislature contemplated that a hearing should be had and that notice of the hearing should be given to the debtor."

The foregoing case was dismissed for want of jurisdiction by this Court in Tatlow v. Rucker, 251 U. S. 537.

The following language is found in the case of Hill v. Johnson County, 82 Kan. 813, 819:

> "Another objection urged is that the act contains no express provision for notice to the property owners before the special assessment becomes a tax upon the property. A complete answer to this is found in the cases of Gilmore, County Clerk v. Hentig, 33 Kan. 156, and Railroad Co. v. Abilene, 78 Kan. 820. Every

presumption is in favor of the validity of the statute, and it will not be held void merely because there is no express provision for notice to the property owner and opportunity to be heard if there is nothing in the statute which prevents such notice."

Syllabus 3 of Schmeling v. Woolworth Company, 137 Kan. 573, reads as follows:

> "Workmen's Compensation Act—Application of Act—Election—Constitutional Law. The failure of R. S. 1931 Supp. 44-505 and 44-542 to require notice to be given of the election of employers privileged to elect to come within the provisions of the workmen's compensation law, being those in the non-hazardous class, does not render those sections unconstitutional or void as being in violation of the provisions of the fourteenth amendment to the constitution of the United States or in violation of sections 1 and 18 of the bill of rights of the state of Kansas."

Also to quote Syllabus 2 of Railway v. Railway Commissioner, 85 Kan. 229:

> "2—Statute Constitutional—Penalty for Failure to Obey Order of Commissioners. Chapter 271 of the Laws of 1907 is not unconstitutional because it fails to make provision for notice to railroad companies before an order is made requiring them to provide freight depots and freight terminal facilities nor because of the penalty imposed for a failure to obey an order of that kind."

See also Newman v. City of Emporia, 41 Kan. 583.

This same principle has been frequently applied by this Court. To quote from the opinion in St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 369:

"And in doing this we ought not to indulge the presumption either that the Legislature intended to exceed the limits imposed upon state action by the federal constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this: That if a statute will bear two constructions, one within and the other beyond the constitutional power of the law making body, the courts should adopt that which is consistent with the constitution because it is to be presumed that the Legislature intended to act within the scope of its authority. U. S. v. Coombs, 12 Pet. 72, 76; 9 L. ed. 1004, 1006; Grenada County v. Brogden (Grenada County v. Brown), 112 U. S. 261, 269, 28 L. ed. 704, 707; 5 Sup. Ct. Rep. 125; Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 101; 47 L. ed. 721, 726, 23 Sup. Ct. Rep. 611."

In the case of Arizona Copper Company v. Hammer, 250 U. S. 400, the following statement appears at page 430:

"*** and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the federal constitution."

See also Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.

In Toombs v. Citizens Bank, 281 U. S. 643, it is held that a state statute providing that it shall be the duty of the officers and directors of a bank, upon receiving notice from the superintendent of banking that its capital has become impaired, immediately to call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the im-

pairment, may be construed as impliedly requiring reasonable notice of such meeting to be first given.

The court says on page 647 of the opinion:

> "In assailing the constitutionality of a state statute the burden rests upon appellant to establish that it infringes the constitutional guarantee which he invokes. If the state court has not otherwise construed it and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against the state. See Corporation Commission of Oklahoma, etc. v. Lowe, etc., ante, p. 431; South Utah Mines v. Beaver County, 262 U. S. 325, 331."

In the case of Paulsen v. City of Portland, 149 U. S. 30, Syl. 1 reads as follows:

> "In view of the notice actually given of the meetings of the freeholders appointed to estimate the proportionate cost of a sewer in Portland, Oregon, and to assess the proportionate share of the cost thereof upon the several owners of property benefited thereby, and in view of the construction placed upon the ordinance by the City Council, and in view of the approval of the proceedings by the Supreme Court of the State as being in conformity with the laws thereof, Held, that, notwithstanding the doubt arising from the lack of express provision for notice, the requirements of the Constitution as to due process of law had not been violated."

See also Home Telephone & Telegraph Company v. Los Angeles, 211 U. S. 265.

This Court reversed the decision of a Federal District Court enjoining enforcement of a statute of Tennessee in the case of Bratton v. Chandler, 260 U. S. 110, wherein it was held that in view of the rule that a statute must be

construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score, a provision of a statute looking to the licensing of real estate brokers, that the commission is authorized to "require and procure" satisfactory proof as to the qualifications of applicants, will not be held to be unconstitutional, as giving the applicant no opportunity to meet evidence procured by the commission as to his qualifications, through notice and opportunity to be heard.

A very good statement is found in the opinion in Manufacturers Light & Heat Company v. Ott, 215 Fed. 940, 944:

> "4. The statute is not subject to the objection that it attempts to authorize the Commission to take property without due process of law in that it makes no provision for notice and a hearing before fixing rates. The complainants were entitled to notice and a hearing, but express statutory requirement for such notice is not essential, for the reason that the constitutional requirement that there shall be notice and an opportunity to be heard is a part of the law governing the Commission. As the statute is silent on the subject, the presumption is that the Legislature intended the Commission to comply with the Constitution, not to violate it. Such commissions are under two laws, namely, the statute law of the state, which confers upon them certain powers over public service corporations, and the constitutional law of the state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law, that is, after giving the companies due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution. Paul-

sen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. ed. 637; Chicago B. & Q. R. R. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948; French v. Barber A. P. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. ed. 879."

Very much here in point is the case of Detroit Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, where it was held that neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the commissioner of railroads made and issued under Mich. Puc. Acts 1893, act No. 171, para. 5, requiring such street railway to pay one-half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed.

Syl. 3 is as follows:

"There is a difference between ordinary vehicles and electric cars which the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws.

Where the objection that a statute does not provide for notice is taken for the first time in this court, and the record shows that there actually was notice given, it is not open to the plaintiff in error to complain that the statute did not provide for such notice."

DOES THE STATUTE, (CHAPTER 225 LAWS OF 1929) AUTHORIZE JUDICIAL REVIEW OF THE ACTION OF THE COMMISSION?

Under the rules of statutory construction stated above we conclude that the statute does not violate the terms of Section 1 of the 14th Amendment by reason of the fact that it does not in words provide the time or the manner of the service of notice or the time or the mode of the hearing to be granted to the party affected. However, all of the argument of the appellant assumes that the Legislature intended the orders of the Commission to be final determinations. Section 3 of the Act (See Appendix) contains this provision:

> " *** That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein shall be made except when the public safety shall require such substantial change."

The Supreme Court of Kansas has held that this provision in fact authorizes judicial inquiry. The case of State ex rel, Logan, v. State Highway Commission, 133 Kan. 357, was an action to enjoin a proposed highway improvement. The opinion, page 362 quotes the portion of Section 3 as set out above and continues:

> "The language of the provision is plain and needs no interpretation, and the allegations of the petition that the proposed change is substantial and is not being made for public safety would, if taken alone, be sufficient to state a cause of action, although such allegations might well be subject to the criticism of being conclusions rather than statements of fact."

The case of State ex rel, Wyman, v. State Highway Commission, 136 Kan. 297, was likewise an action to enjoin a proposed highway improvement and the case is well summed up in the following paragraph, at pages 297, 298:

> "Appellants state in their brief that they offered evidence to prove the change was a substantial one and the public safety did not require it. It is the refusal to consider this evidence which is urged as error. The evidence is not brought here in the record, neither does the record show that this evidence was ever offered to the trial court in any record form. For that reason, we cannot consider it. (Leach v. Urschel, 112 Kan. 629, 212 Pac. 111.)"

Syllabus No. 2 of Bobbitt v. State Highway Commission, 138 Kan. 487, is as follows:

> "A change in the route of a portion of a transcontinental highway, which eliminates railroad crossings entirely, eliminates corners on intersecting section lines, and reduces curves from six to two, all in thirty miles of highway, is held to be a change in the interest of public safety."

We construe the provision in Section 3, above quoted, to mean that the public safety is a jurisdictional fact upon which the validity of any order of the Highway Commission for a substantial change must rest. Appellant below made no attempt to challenge the validity of the order of the Commission and rested its case entirely upon the validity of the statute, if construed to apply equally to highways in existence and to highways to be established, reestablished, or relocated at a future time. Had an issue been made of the public safety, the lower court would, of necessity, have determined it. It was however entirely

eliminated from consideration by the lower court by appellant's admissions. (See opinion on Motion for a Rehearing, R. 31, 32.)

The changes in the highways which require the structural changes ordered to be made by the peremptory writ of mandamus herein issued are most certainly and undeniably substantial changes. These changes are the entire relocation of highways or the widening of existing highways to such an extent as to require the acquisition of new highway right of way. However, what any court might determine under any existing state of facts to be a substantial change is immaterial here. The exercise of the police power is authorized and can be validly exercised under this statute only in the interest of public safety.

The court below said in its opinion (R. 21, 22):

> "What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to co-users of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway was established before or after the privately owned structures were established."

What are the questions upon which a pipeline company, under similar circumstances, is entitled to a hearing? These are, First, The necessity in the interest of public safety; Second, Whether the plan is reasonable; Third, Whether the Legislature had delegated the state's police

power; and Fourth, Whether such a delegation violates constitutional inhibitions.

The first of these questions is the only one upon which the Commission under any statutory set up conceivable might be legally authorized to make any final determination and as we have seen an action will lie in the state courts to determine this fact.

The second, the reasonableness of the plan, is of course, a proper inquiry for consideration by the Commission but any order or determination of an administrative body must be reasonable and this has always been held to be a judicial question.

In re Wilshire, 103 F. 620, 622.
Tee Gee v. San Francisco, 235 F. 757.
Abie State Bank v. Weaver, 282 U. S. 766.
Tebbetts v. McElroy, 56 F. 2d 621.

It was upon consideration of the first two questions that the Commission adopted changes in the proposed plan which resulted in a saving, according to appellant's estimate, of the sum of $3,205.00 and while dehors the record, we frankly state that had not the Commission done this the Supreme Court of Kansas would undoubtedly have ordered the same changes of plan.

The third question, whether the statute in fact delegated the state's police power, is a question of statutory construction for the state courts and its decision under its own rules of statutory construction is final. American Manufacturing Co. v. St. Louis, 250 U. S. 459; Danciger v. Cooley, 248 U. S. 319; Wells v. State, 248 U. S. 165; Pennsylvania Railroad Co. v. Towers, 245 U. S. 6; Rogers

v. Hennepin Co., 240 U. S. 184. Of course, if the state courts should determine that the legislature had not delegated the state's police power the commission's only remedy would have been to have proceeded by the right of eminent domain and made full compensation for any damages occasioned by the public need.

The last question, whether the law is violative of constitutional inhibitions is a question which could not possibly be finally resolved by any administrative agency or even constitute a proper inquiry.

Had the commission attempted to do the work involved in accomplishing the structural changes in appellant's lines, it most certainly could have been enjoined from any interference with the lines unless it could show necessity in the interest of public safety. Had the company permitted the changes to be made without resorting to a court of equity and had refused to pay the costs involved, the statute requires that the attorney general bring an action to recover the amount of the costs of such changes, and it would have been incumbent upon the Commission to have alleged and proved by competent evidence that the public safety required such substantial changes. In such a case a sufficient defense would be established by showing the changes required are arbitrary and unreasonable under all the circumstances. However, appellee here brought an action in mandamus praying an order of the court directing appellant to make the changes. Appellant had every opportunity to question the sufficiency of the proceedings before the Commission. This it did not do. It stood firmly on the proposition that it was a

denial of due process to require the changes to be made at its own expense. In admitting the public necessity for the changes it admitted every question the Commission had any possible pretense of authority to determine even to its own satisfaction.

The Supreme Court of Kansas in determining every question presented to it has only found that the act applies to new highways as well as preexisting highways and that to require the costs of the changes in the lines necessitated by public safety to be borne by the owner of the lines involved is a valid exercise of the police power. We submit that this Court ought not be called upon to determine further questions of statutory interpretation where they have not been submitted to the Supreme Court of the state wherein the legislation was enacted.

APPELLANT HAS IN FACT BEEN GRANTED A FULL AND COMPLETE JUDICIAL REVIEW.

As we have seen the appellant herein had every opportunity to present any defense that it might have seen fit in the court below. By its admissions it eliminated all questions except that of statutory construction (which question we are not here concerned with) and the question as to whether the statute in fact legally delegated the state's police power to the Highway Commission to accomplish at the cost of the pipeline company the structural changes and alterations of design in appellant's lines. Very much in point with this proposition is the case of Security Trust Company v. Lexington, 203 U. S. 323, Syl. 1:

"Before a special assessment, levied by legislative authority of a State—in this case providing for back taxes in Kentucky—can be actually enforced, or during the process of its enforcement, the taxpayer must have an opportunity to be heard as to its validity and extent; but this rule is met where the state court has afforded the taxpayer full opportunity to be heard on both of those questions, and after such opportunity has rendered a judgment providing for the enforcement of such amount of the tax as it finds actually due."

In that case plaintiff brought an action in the state court for an injunction to restrain the defendants from the collection of certain back taxes accruing in prior years. Temporary injunction was granted and upon the trial the amount of the taxes was reduced and the remainder declared to be a lien upon the property. The judgment was affirmed in the court of appeals of Kentucky and brought to this Court by writ of error. Appellant's principal complaint being that the assessor had levied the tax upon the property without notice in any form and that no provision was made for any hearing by any board of equalization. This Court said, speaking through Mr. Justice Peckham, page 333, 334:

"The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessment before the board of equalization.

"But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and after such opportunity has rendered a judgment which provides for the enforcement of the tax as it

has been reduced by the court, the reduction amounting to over five thousand dollars. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in McMillen v. Anderson, 95 U. S. 37, and Hagar v. Reclamation District, 111 U. S. 701, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. The state court in this case has held the taxpayer entitled to a hearing and has granted and enforced such right, and upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color at least of legislative authority."

Quoting from page 335:

"We think it sufficiently appears that the plaintiff had an opportunity to be heard upon the question of the validity of the tax, both for want of notice in fact, and whether the property assessed for back taxes had really been omitted from the original list for the years in question, and was therefore properly taxable under the assessment for back taxes. Even if the assessment had been made by the assessor without notice, yet if upon the hearing in this cause the plaintiff had the right and an opportunity to be heard, and the assessment was thereon reduced, it has obtained all the hearing it was entitled to. We think the plaintiff did have such a hearing, and the judgment is correct, so far at least as this court is authorized to review it. It is therefore Affirmed."

In the case of Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501, a similar conclusion was reached. The fourth syllabus reads as follows:

> "Notice and opportunity to be heard before the creation of a special improvement district are not essential to due process if a full hearing be afforded in subsequent judicial proceedings to enforce the tax."

Quoting from the opinion of the court, pages 505, 506:

> "It is insisted that no notice was given, or opportunity to be heard, prior to the creation of the sewer district, and, therefore, due process of law was denied. These tax bills were levied upon districts the creation of which was authorized by legislative authority. The record discloses that the owner has had full opportunity to be heard, in judicial proceedings to enforce the tax, and its contentions of arbitrary action and lack of benefits conferred have been considered and decided. This is due process. Davidson v. New Orleans, 96 U. S. 97; Embree v. Kansas City Road District, 240 U. S. 242, 251."

In the case at bar the appellant cannot deny that it had every opportunity in the Supreme Court of the State of Kansas to offer any defense that it saw fit. It in no way assailed the validity of the order of the Highway Commission but stood solely upon the construction of the statute and the validity of the statute when measured by the first clause of the 14th amendment to the Constitution of the United States in its substantive sense as distinguished from its procedural or remedial sense as well as by the equal protection clause and the interstate commerce clause of the constitution.

The statute provides that the commission may do the work involved, after demand and refusal, and that the attorney general shall bring suit in the name of the state to recover the amount of such costs. It is not to be presumed that the legislature intended the commission to undertake to lower, move or encase the 24 inch high pressure interstate natural gas pipe line of appellant or to undertake to move high voltage electrical transmission lines or even any part of the great telephone or telegraph systems. Were a single pipe, pole, pier or abutment involved, the commission might safely and efficiently perform the work and have a suit instituted to recover the cost. Appellant admits, R. 12:

> " *** that plaintiff is not in position to make the changes or to attempt to make such changes in defendant's pipe lines and telephone lines, and that it would be impractical to attempt to make such changes, and admits that such work can be accomplished efficiently and with reasonable safety only by persons acting under the control of the defendant."

Because appellee can exercise no control over the officers and employees of appellant, it must find its remedy before the courts and proceed in mandamus or pursue another similar remedy. This has been done in this case and regardless of the procedure before the highway commission, we submit that appellant has had a full and complete judicial hearing.

APPELLANT IS NOT DENIED THE EQUAL PROTECTION OF THE LAW.

Appellant urgently contends that Sec. 16, chap. 225, Laws of Kansas, 1929, denies to the appellant the equal protection of the laws in violation of the 14th amendment to the Federal Constitution (appellant's brief 33-37).

This clause is an inhibition upon the power of the state and prohibits the legislature of any state from enacting legislation which discriminates between individuals of the same class. A state through its legislature can, however, classify the subjects of its legislation and such classifications, if not unreasonable and discriminatory, will be upheld. The presumption is that the legislative classification is reasonable. In the case of Louisville & Nashville Co. v. Melton, 218 U. S. 36, this Court said at page 52 of the opinion:

> "That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition."

The question as to whether a legislative enactment is such that it denies to certain individuals the equal protection of the law usually depends upon whether those subjected to the various laws are of the same or different classes. There is no discrimination merely because the burdens of the legislation rest unequally, provided, that the subjects of those burdens are not in the same class as those not subjected to a similar burden.

Such is the issue here. Appellant contends that it and other companies maintaining pipe lines, telephone and telegraph lines, etc., are subjected to a greater burden than are railroad companies. Sec. 16 of the act under consideration (Chap. 225, Laws of Kansas, 1929) provides as follows:

> "That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings. *** Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance *** ."

It will be observed that Sec. 15 applies only to railroad companies and provides that this appellee shall determine

the proportion of the cost of said construction work to be paid by it, but such payment shall not exceed 50%. Section 16 applies only to companies created for the purpose of constructing and maintaining pipe lines, telephone and telegraph lines, etc., and provides that all of the cost of moving, changing or relocating such lines shall be paid by the owners thereof.

It seems obvious that each section applies to a distinct and different class of individuals. There is no similarity between the classes subjected to the burdens of Sec. 15 and the classes subjected to the burdens of Sec. 16, except that both are engaged in transportation for profit.

Railroads are common carriers and are in direct competition with the users of the highways while no form of transportation yet devised offers serious competition to pipelines, power lines, telegraph or telephone lines. Pipeline companies and other transmission line companies use the highways for their own purposes while the railroads furnish their own highways. A portion of nearly every mile [redacted] of public highway in this country is occupied by one or more lines of various transmission companies. The uses of the various users of the highways are inconsistent only when they interfere with each other. Appellant's right to use the highways has never been denied, provided it is done in a way that will not seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public. State v. Weber, 88 Kan. 175; State v. Gas Company, 71 Kan. 508; McCann v. Telegraph Company, 69 Kan. 210.

Railroads in the very nature of things must have the exclusive and uninterrupted use of their rights of way. The pipeline company owns certain easements. These are merely rights to cross the land with its pipes and poles. The Highway Commission has likewise acquired by purchase from the owners of the same land easements for highway purposes. The rights of the parties are not inconsistent except that in certain particular instances the public safety requires certain structural alterations in the pipelines and polelines. Every time a railroad builds a viaduct or other grade crossing elimination structure it is in fact aiding its competitors by making travel on the highways more convenient and less hazardous.

Section 23 of the Act here under consideration provides that any person who shall without contributing negligence on his part sustain damage by reason of a defect in a state highway may recover such damages from the State of Kansas. This liability is not predicated on negligence but is predicated upon the existence of a defect in a state highway. Surely an open excavation at the location of a pipeline would be a defect in a state highway and probably telephone poles in the center of the highway might well be held to be a defect and although these defects might be put in the highway by other users of the same right of way the state is liable for such damages as any person who, without contributory negligence on his part, shall sustain. On the other hand, it could not be seriously argued that injuries received at grade crossings by collision between automobiles and trains could be said to be the result of any defect. This consider-

ation alone we feel would constitute a very real basis for a separate classification of railroads and pipelines.

Appellant asks on page 34 of its brief whether it is reasonable to provide for payment of a portion of the costs to the one class and not to the other. There is ample reason for the State Highway Commission upon some occasions to pay a portion of the cost of construction of a viaduct. The viaduct so constructed may be a quarter of a mile in length and will constitute just that much of improved highway. In that case it seems only reasonable that the State Highway Commission should pay part of the cost of such a structure. It will be observed that Section 15 provides that the railroad shall construct, improve, reconstruct, etc., and then provides that the State Highway Commission *may* (it is not mandatory) share in the expense thereof not to exceed 50%.

Appellee finds no fault with the cases of Connelly v. Union Sewer Pipe Co., 184 U. S. 540, Barbier v. Connly, 113 U. S. 27, or Quaker City Cab Co. v. Commonwealth of Pa., 277 U. S. 389, cited by appellant upon this proposition. These cases clearly substantiate the rule stated above that the classifications cannot be arbitrary but that they must be based upon substantial differences, and that no greater burden should be laid upon one than are laid upon others in the same calling and condition. A railroad grade crossing presents an entirely different problem for public regulation than does a pipeline buried beneath the highway. Such pipelines, as distinguished from railroad bridges or grade separations, form no part of the highway and add nothing to the state system of highways.

Appellant says on page 34 of its brief that railroads operating their fast moving trains across highways are inherently more dangerous than are transmission lines such as owned by it. Danger, of course, is a relative term. Oil, natural gas or electricity are sources of differing degrees of danger and hazard to life, limb and property depending entirely upon circumstances. The twenty-four inch high pressure natural gas transmission line of appellant when buried beneath the surface of such highways certainly is not a constant hazard to vehicular traffic. However, a leaky line of such magnitude at any such point could hardly be said to be an innocent instrumentality. If such a line were not encased in a large steel or clay pipe or tube where it crossed beneath state highways and it should become necessary to remove it and repair it, the resulting excavation across or along the public highway would not only seriously inconvenience the other users of the highways but would constitute an actual hazard and a condition inimical to the public safety.

Appellant asks whether in the final analysis railroads are so different from pipelines that separate classification is justified. Appellee submits that the classification is justified. In the case of Metropolitan Street Railway Company v. N. Y., 199 U. S. 1, this Court held that separate classification was permissible between surface railroads and sub-surface railroads so as to justify a diversity in the mode and extent of taxation.

In Savannah Thunderbolt, etc., Railway v. Savannah, 198 U. S. 392, a Street Railroad Company contended that it was subjected to a tax not assessed against a steam

railway, although the steam railway used the city streets and did business on the city streets by transporting freights from its regular station to various side tracks and that such a classification was contrary to the 14th Amendment. This Court held: "The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation."

The case of Silver v. Silver, 280 U. S. 117, raises the constitutional question of whether or not a state statute providing that no person carried gratuitously as a passenger in an automobile may recover from the owner or operator for injuries caused by its negligent operation was in conflict with the equal protection clause in that it made an unreasonable classification. This Court in an opinion by Mr. Justice Stone held such a classification was reasonable and that a statutory classification may not be declared forbidden as arbitrary unless grounds for the distinction are plainly absent.

In the case of Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, a classification, based upon the number of employees, in a state statute abolishing the fellow servant and assumption of risk defenses under specified conditions was challenged. Mr. Justice Day says at page 576 of the opinion:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Lindsley v. Natural Carbonis Gas Co., 220 U. S. 61, 76, and previous cases in this court cited

on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded."

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, (cited in the opinion of Jeffrey Mfg. Co. case above), is a leading case upon the question of legislative classification under the due process clause. Quoting from page 78 of the opinion by Justice Van DeVanter this Court said:

"Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably

can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41; Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 256; Munn v. Illinois, 94 U. S. 113, 132; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 615."

In Bachtel v. Wilson, 204 U. S. 36, headnote 3 states the rule as follows:

"While a state legislature may not arbitrarily select certain individuals for the operation of its statutes, the selection in order to be obnoxious to the equal protection clause of the Fourteenth Amendment must be clearly and actually arbitrary and unreasonable and not merely possibly so."

The Kansas legislature passed an act in 1885, the constitutionality of which was challenged in the case of A. T. & S. F. R. R. Co. v. Matthews, 174 U. S. 96, upon the ground that it violated the equal protection clause of the Federal Constitution. This statute made railroad companies liable for attorney fees for recovery of damages by fire. This Court upheld this statute and at page 106 of the opinion, said:

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting up the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter

into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations, and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case of Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, a Texas classification of life and health insurance companies separately from fire and marine insurance companies was held to be on a reasonable basis and not in violation of the due process clause.

See also:

Magown v. Illinois Trust & Saving Bank, 170 U. S. 283.
Finley v. California, 222 U. S. 28.
Mutual Loan Co. v. Martell, 222 U. S. 225.
Provident Savings v. Malone, 221 U. S. 660.
Field v. Barber Asphalt Co., 194 U. S. 618.

As may be noted from the many cases cited above, there is no set rule for determining what is or is not a proper legislative classification; it can only be determined by the examination of the facts in each case and by the court's action of inclusion and exclusion. In view of the

many different classifications cited above, and upheld by this Court, it seems that the separate classification of a railroad and a pipeline company is neither unreasonable, arbitrary or discriminatory. As heretofore stated, the regulation of the lines of each, where they cross the public highway, presents in each case a different problem to the State Highway Commsision, and a distinction between the two classifications has a reasonable relation to the object sought to be accomplished. The classification here made rests upon a natural and reasonable basis, and it has a substantial relation to the public welfare.

THE STATUTE IS A VALID DELEGATION OF THE POLICE POWER.

Appellant makes very little serious contention on this question except insofar as it is concerned with the alleged failure of the statute to provide notice. However, because this question in the sense of the taking without compensation was appellant's constitutional contention in the court below and because the opinion of that court deals principally with this question we submit the following in support of that opinion. The principal contention on this score below was that the Highway Commission should have proceeded to condemn under the right of eminent domain.

In the case of New Orleans Gas Light Company v. Drainage Commission, 197 U. S. 453, the facts were that the gas company had acquired a franchise to supply gas to the city through pipes and mains laid in the streets. The drainage commission proceeding under statutory au-

thority devised a drainage system and in the execution of its plans it became necessary to change the location of some of the pipes and mains of the gas company. The company maintained that because its pipes were located in the streets prior to the statutory enactment delegating police power to the drainage commission, that its rights were vested and it could not be required to change its pipes at its own cost and expense, and that such a requirement would amount to a taking of its property for public use without compensation. At page 461 of the opinion this Court makes the following statement:

> "We think whatever right the gas company acquired was subject, insofar as the location of its pipes were concerned, to such further regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (National Waterworks Company v. City of Kansas, 28 Fed. 921; Gas Light and Coke Co. v. Columbus, 50 Ohio State, 65.)"

The case of Erie Railroad Company v. Board of Utility Commissioners, 254 U. S. 394, is a number of consolidated cases all of which arose out of a grade crossing elimination and which involved the lines of the railroad, the street car company, the telegraph company, certain private spur tracks and the pipelines of a water company. This Court said, speaking through Justice Holmes, on page 410, 411:

> "Grade crossings call for a necessary adjustment of two conflicting interests, that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were

laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirements were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 246, 63 L. ed. 958, 862, 39 Sup. Ct. Rep. 450."

The rule is stated in M. K. & T. v. Oklahoma, 271 U. S. 303, 307, as follows:

"It is elementary that for the safety and convenience of the public, the state, either directly or through its municipalities may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to

that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. (Northern P. R. Co. v. Duluth, 208 U. S. 583, 597; 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; Chi. M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 438, 58 L. ed. 671, 674, 34 Sup. Ct. Rep. 400; Mo. P. R. Co. v. Omaha, 235 U. S. 121, 127, 59 L. ed. 157, 160, 35 Sup. Ct. Rep. 82; Erie R. Co. v. Public Utilities Comm'rs., 254 U. S. 394, 409, 412, 65 L. ed. 322, 333, 334, P. U. R. 1921 C, 143, 41, Sup. Ct. Cot 169.) And such costs are not included in the just compensation which the railroad companies are entitled to receive. Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 343, 54 L. Ed. 1060, 1064, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 440, 58 L. ed. 675, 34 Sup. Ct. Rep. 40)"

It is true that very few cases involving pipelines have reached this court although the question here presented as applying to railroads has often been adjudicated. In Lake Shore Ry. v. Clough, 242 U. S. 375, this court held that the expense of taking out existing piers and abutments of a railway bridge and erecting new ones, made necessary by the deepening of a channel in the carrying out of a proposed drainage system to be constructed in the public interest under the sanction of the Indiana Drainage Act of March 11, 1907, may be cast upon the railway company without denying the due process of law guaranteed by U. S. Const., 14th Amend., although the present bridge and abutments form no obstruction to the natural flow of the stream, where the company's

charter obligates it not to interfere with the free use, or unnecessarily impair the usefulness of any stream or water-course which its road may cross—a duty which the highest state court interprets as a continuing one, and as applicable to artificial as well as natural water-courses.

Where the pipeline company the owner of the fee of the land which it occupies, it might occupy a different position. As it is, it does not assume the burdens of a landowner but occupies easements for its own purposes only. This being so and because the simultaneous occupation of the same land is not inconsistent the private rights of the pipeline company are not dispossessed, they are being merely regulated in order that the traveling public be not endangered.

We consider further argument in this regard unnecessary although we respectfully invite the attention of the court to the following cases, thought to be particularly applicable: Minneapolis v. Railway Company, 98 Minn. 380; 108 N. W. 261, affirmed 214 U. S. 497; Chi. Milwaukee & St. Paul v. Minneapolis, 232 U. S. 430; Chi. etc. R. Co. v. Trambarger, 238 U. S. 78; Mo. Pac. Railway Co. v. Omaha, 235 U. S. 127; West Chicago R. Co. v. Illinois, 201 U. S. 526; New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556; C. B. & Q. R. Co. v. Chicago, 166 U. S. 226.

CONCLUSION.

Appellee concludes that the provisions of Section 16, Chapter 225, Laws of Kansas, 1929, are not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States by reason of the rules of statutory construction established by the Supreme Court of the State of Kansas and approved in similar cases by this court and approved in other jurisdictions by this court; that the statute implies that a notice shall be given to the persons affected by the orders of the commission made under said section, and that an opportunity to be heard is to be granted. However, section 3 of the act in effect authorizes a judicial review of the action of the commission, and appellee submits that the pipe line company in this case has been afforded a hearing in the Supreme Court of the State of Kansas, and although the record in this case is silent as to what proceedings were had by the Highway Commission, that such a hearing by the Supreme Court constitutes due process.

Because the only similarities between railroads, pipe lines and telephone lines is the fact that they are all engaged in transportation, we believe that separate legislative classification is justified and that the separate classification of railroads in section 15 of the act is both reasonable and proper, and that the same does not deny to the appellant the equal protection of the laws. We further conclude that the statute is a valid delegation of the state's police power and that the order of the commission issued thereunder is a valid exercise of police

power. We therefore respectfully pray that the judgment of the Supreme Court of the State of Kansas be affirmed.

Respectfully submitted,

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APPENDIX.

CHAPTER 225, SESSION LAWS OF KANSAS, 1929.

RELATING TO ROADS AND HIGHWAYS, THE STATE HIGHWAY COMMISSION AND ITS POWERS AND DUTIES, PROVIDING FOR THE CONSTRUCTION, IMPROVEMENT, RECONSTRUCTION AND MAINTENANCE OF THE STATE HIGHWAY SYSTEM AND FOR THE REIMBURSEMENT OF BENEFIT DISTRICTS.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That section 1, chapter 255, Laws of 1927, be amended to read as follows: That there is hereby created a state highway commission which shall be a body corporate with powers to sue and be sued. Such highway commission shall consist of six members to be appointed by the governor, one from each of the following districts: First district shall comprise the counties of Doniphan, Atchison, Leavenworth, Wyandotte, Johnson, Douglas, Jefferson, Brown, Jackson, Shawnee, Osage, Nemaha, Lyon, Wabaunsee, Pottawatomie, Marshall and Riley. Second district shall comprise the counties of Washington, Clay, Geary, Morris, Chase, Dickinson, Marion, McPherson, Saline, Ottawa, Cloud, Republic, Jewell, Mitchell, Lincoln and Ellsworth. Third district shall comprise the counties of Smith, Osborne, Russell, Phillips, Rooks, Ellis, Norton, Graham, Trego, Decatur, Sheridan, Gove, Rawlins, Thomas, Logan, Cheyenne, Sherman and Wallace. Fourth district shall comprise the counties of Miami, Linn, Bourbon, Crawford, Cherokee, Franklin, Anderson, Allen, Neosho, Labette, Coffey, Woodson, Wilson, Montgomery,

Greenwood, Elk and Chautauqua. Fifth district shall comprise the counties of Butler, Cowley, Harvey, Sedgwick, Sumner, Rice, Reno, Kingman, Harper, Barton, Stafford, Pratt, Barber, Rush, Pawnee, Edwards, Kiowa, and Comanche. Sixth district shall comprise the counties of Ness, Hodgeman, Ford, Clark, Lane, Finney, Gray, Meade, Scott, Haskell, Seward, Wichita, Kearney, Grant, Stevens, Greeley, Hamilton, Stanton, and Morton. The members forming the first commission hereunder shall be appointed within thirty days after the passage of this act, and shall serve as follows: The commissioners from the odd-numbered districts shall serve until March 31, 1928. The commissioners from the even-numbered districts shall serve up to and including March 31, 1929. Before the expiration of the term of a commissioner the governor shall appoint his successor for a term of two years, to assume his duties on April 1st next following: Provided, however, in case of a vacancy for any cause, the governor shall make an appointment to become immediately effective for the unexpired term. Each member shall receive as compensation for his services, ten dollars ($10) per day for each day actually spent in performance of his duties, not to exceed one thousand five hundred dollars ($1,500) per year, and his actual and necessary traveling expenses. Each member shall give bond to the state in the sum of five thousand dollars ($5,000) conditioned upon the faithful discharge of the duties required by law.

Sec. 2. That section 74-2002, Revised Statutes 1923, be amended to read as follows: That the executive

council shall provide suitable offices at Topeka for the commission, where it will hold regular meetings at such times as the commission may decide; it shall keep a common seal of such design as the commission shall determine; it shall keep a record of all proceedings and all of the files and records, under reasonable regulations, shall be kept open for public inspection and certified copies thereof, signed by the secretary and attested with the seal, shall be received in evidence in any court in the state. The state highway engineer and his assistats shall be provided with offices ad drafting rooms at Topeka, and such other points throughout the state as are necessary, and the engineering testing laboratories at the Kansas state agricultural college at Manhattan shall be available for the use of the commission and the state highway engineer at all times.

Sec. 3. That section 6, chapter 255, Laws of 1927, be amended to read as follows: That the state highway commission shall designate, adopt and establish and may let out, open, relocate, alter, vacate, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 8,690 miles, and the total mileage of which in each county shall not be less than the sum of the north to south and east to west diameters of the county, and which shall connect the county seats and principal cities and market centers which highways and all bridges and culverts thereon shall comprise the state highway system: Provided, That the highways heretofore designated as state highways shall be a part of the state highway system and no substantial change therein

shall be made except when the public safety shall require such substantial change. Highways designated under this act shall be state highways, and all other highways shall be either county roads or township roads as provided for elsewhere in the Kansas statutes. The state highway system thus designated shall be constructed, improved, reconstructed and maintained by the state highway commission from funds hereinafter and otherwise by law provided. In addition to the designation of highways as herein provided, the state highway commission shall designate in those cities on the state highway system certain streets as connecting links in such system.

Sec. 4. That section 2, chapter 255, Laws of 1927, be amended to read as follows: All members of the state highway commission, the director of highways and all engineers and all other employees designated by the commission, shall take the oath provided in the constitution for state officers, and in addition thereto shall take and subscribe to the following oath before entering on the discharge of their duties: "I do solemnly swear (or affirm) that I am not now nor will I be interested either directly or indirectly, during my connection with the state highway commission, otherwise than as an official of the state, in any contract or arrangement for the construction or maintenance of any public road or highway, nor in the provision of supplies or materials therefor, nor in the appointment of any person to any position in connection therewith; nor will I ever use any information or influence I may have by reason of my official position to gain any pecuniary reward or material advantage to

myself, nor disclose such information that it may be used by others. So help me God."

Sec. 5. That section 3, chapter 255, Laws of 1927, be amended to read as follows: The commission may establish rules and regulations to govern the transaction of all business and shall appoint a director of highways who shall be a practical business man, shall receive an annual salary of not to exceed five thousand dollars ($5,000) shall be chosen solely for fitness, irrespective of political beliefs or affiliations, and may be removed by a majority vote of the commission at any time. The director of highways shall be the executive officer of the commission, and shall be subject to the orders and direction of the commission. The director of highways shall give his whole time to the duties of his office. Before entering upon the duties of his office, the director of highways shall give bond to the State of Kansas in the sum of twenty-five thousand dollars ($25,000) subject to the approval of the state highway commission, conditioned upon the faithful performance of his duties. Said bond, when approved by the commission, shall be filed with the secretary of state.

Sec. 6. That section 4, chapter 255, Laws of 1927, be amended to read as follows: The members of the state highway commission, and all employees of the state highway commission who are required by law or by the order of such commission to furnish bond, shall furnish such bond conditioned upon the faithful performance of all duties imposed by law, or by the rules and regulations of said state highway commission, and for the proper ac-

counting of all property, moneys, and records coming into the possession of such officials or employees by virtue of their official positions. Said bonds shall be in each case signed by a surety company duly authorized to transact business in the State of Kansas, and the cost thereof shall be paid from the funds provided for the support and maintenance of the state highway commission and the state highway department.

Sec. 7. That section 5, chapter 255, Laws of 1927, be amended to read as follows: The director of highways, subject to the approval of the state highway commission, shall have full authority to appoint a state highway engineer and such other employees as shall be necessary to carry on the work of the commission, and shall have full authority to employ, remove, define the duties, and fix the salaries of engineers, clerks, stenographers, and such other employees as may be necessary to carry on the work of the commission. The attorney-general shall appoint an assistant attorney-general, who shall be the attorney for the state highway commission, and whose salary shall be fixed and paid as provided for employees of said state highway commission. The director of highways shall have the supervision of the work of the state highway commission and of each of its divisions under the direction of the state highway commission charged with carrying out the provisions of this act or the rules and regulations which may be enacted by the commission, and may assign such employees and reassign them at his discretion.

Sec. 8. That section 11, chapter 255, Laws of 1927, be amended to read as follows: The state highway commission is authorized to perform all work, or to enter into, perform and require the performance of all contracts incident to the construction, improvement, reconstruction and maintenance of the state highway system and operation of the state highway department and shall take such steps as will give the provisions of this act full force and effect and do and perform all other duties required by law: Provided, That all bids shall be received by the state highway commission in the state highway commissioner's district in which the work is to be done and in the county where the major portion of the work to be contracted for on the same date is located: Provided further, That the state highway commission may enter into contracts with any of the counties of the state to do any work in the repair, construction or maintenance of the state highway system.

Sec. 9. The state highway commission shall, before awarding any contract for the construction, improvement, reconstruction or maintenance of the state highway system, publish notice of the letting at least once in each week for two consecutive weeks in the official newspaper published in each county in which such highways or a section thereof is to be constructed or work to be done, and in such other newspaper as the state highway commission may designate, which notice shall specify with reasonably minuteness the character of the improvement contemplated, the time and place at which the bids will be received, and invite sealed proposals for the same. Such

other notice may also be given as the state highway commission may deem necessary and proper.

Sec. 10. Before advertising for bids for any contract as provided in the preceding section said state highway commission shall provide plans and specifications of the proposed work or improvement, which plans and specifications shall be displayed for the inspection of bidders at the office of the state highway commission and in the office of the county clerk in the county or counties where work is to be done at least fifteen days before the time for receiving bids.

Sec. 11. All contracts for the construction, improvement, reconstruction and maintenance of the state highway system, the cost of which exceeds one thousand dollars ($1,000) except contracts between the state highway commission and the various counties, shall be awarded at a public letting to the lowest responsible bidder. The state highway commission shall make necessary rules and regulations covering the making and receiving of bids and letting of contracts: Provided, That in case of an emergency, the nature of which shall be stated in the minutes of the state highway commission, contracts for repairs and reconstruction may be let without public letting and notice, as provided in this act. The person or persons to whom a contract may be awarded shall give good and sufficient surety bond by a company authorized to do business in this state, to be approved by the state highway commission in such sum as the state highway commission shall fix, not less than such contract price, conditioned that such contractor will faithfully perform

such contract in every respect: Provided, That the state highway commission shall have the right to reject any and all bids.

Sec. 12. The state highway commission shall make partial payment to a contractor performing any road or bridge work under contract with it, as the work may progress, said partial payment not to exceed eighty-five per cent (85%) of the contract price of the material delivered and work done and accepted. At least fifteen per cent (15%) of the full contract price of any such work shall be withheld until the work is satisfactorily completed and approved by the state highway commission and the provisions of the contract and bond therefor have been fully satisfied.

Sec. 13. After the state highway commission shall deem it advisable for the proper completion of the state highway system to designate any city street as a connecting link in the state highway system, it may assist said city on the state highway system in the construction, improvement and reconstruction of said streets as herein afterward set out. The type of such construction, improvement and reconstruction shall be determined by agreement between the city and the state highway commission, and the construction shall be under the supervision of the state highway commission. The cost of construction, improvement and the reconstruction of such street highways on the basis of a street highway eighteen feet wide shall be paid from the state highway fund provided for construction of state highways, and the cost of the remainder of such street highways shall be paid by the city

from a fund raised in the manner provided by law for the payment for grading, curbing, guttering and paving streets in such city: And provided, That in no event shall the state highway commission be liable for construction, improvement or reconstruction as herein set out unless the state highway commission shall have designated such streets as connecting links in the state highway system: And provided further, That the state highway commission shall decide the time when such construction, improvement or reconstruction shall be commenced.

Sec. 14. That the state highway commission, in the name of the state, may acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain, to any lands or interest or rights therein, to water, gravel, stone, sand or other material, or to spoil banks or to borrow pits necessary for the construction, improvement, reconstruction, maintenance or drainage of the state highway system, or to rights of way giving access to spoil banks or borrow pits or any bed, pit, quarry or other place where gravel, stone, water or other material required in the construction, improvement, reconstruction, maintenance or draiage of state highways may be located. The right of eminent domain when exercised as herein provided shall be in accordance with the provisions of article 1, chapter 26 of the Revised Statutes of 1923. The state highway commission may dispose of any real estate, or any right, title, or degree or variety of interest therein, as it may deem expedient or necessary whenever the commission determines that such real estate, or interest therein, is no longer needed

or used for highway purposes, and may exchange the right of way to be abandoned for new and other right of way: Provided, That when any road on the state highway system is vacated, the lands or interest or rights therein acquired by the state highway commission for right of way under the provisions of this section, unless disposed of as above provided, shall revert to the present owners of the land of which it was originally a part.

Sec. 15. That the state highway commission, in the construction, improvement, reconstruction or maintenance of the state highway system, shall have the power and authority to compel all railroad companies operating steam or electric railroads in this state to construct, improve, reconstruct or maintain in a manner to be approved by the state highway commission, viaducts, tunnels, underpasses, bridges or grade crossings where the lines of said railroad companies intersect state highways, when in the judgment of the state highway commission such viaducts, tunnels, underpasses, bridges or grade crossings are necessary for the proper construction of the state highway system, for the safety of the general public, or for the elimination of a dangerous grade crossing: Provided, That the expense of such construction, improvement, reconstruction or maintenance may be divided between the railroad company and the state highway commission in a fair and equitable proportion to be determined by the state highway commission, the state highway commission, however, to pay not to exceed fifty per cent (50%) of the cost of such construction, improvement, reconstruction or maintenance of viaducts, tunnels, underpasses or

bridges: Provided further, That grade crossings shall be constructed and maintained at the expense of the railroad company. If after due notice to said railroad company that in the judgment of the state highway commission the construction, improvement, reconstruction or maintenance of such viaduct, tunnel, underpass, bridge or grade crossing is necessary, said railroad company fails to comply with the order of the state highway commission as provided by this section, the state highway commission is empowered and authorized to forthwith construct, improve, reconstruct or maintain such viaduct, tunnel, underpass, bridge or grade crossing and the amount so expended for such construction, improvement, reconstruction or maintenance shall comprise a charge against such railroad company and that state highway commission shall render a bill to such railroad company stating the amount expended and for what purpose, and upon the failure or refusal of such railroad company to make payment of the amount due the state the state highway commission shall forward all data and information to the attorney-general of this state, who shall immediately institute a suit in the name of the state highway commission for the recovery of the amount reported by the state highway commission as due from the railroad company for its proportion of the cost of the construction, improvement, reconstruction or maintenance of such viaduct, tunnel, underpass, bridge or grade crossing. Upon the recovery of such fund the state highway commission shall deposit same with the state treasurer and said sum shall be apportioned to the different funds in the amounts expendi-

tures from such funds were made. When the state highway commission deems it advisable, said railroad company may be required by order of the state highway commission, to install and maintain suitable safety devices or warning signals at dangerous or obscure crossings to indicate the approach of trains.

Sec. 16. Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highways, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abut-

ments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid.

Sec. 17. That section 7, chapter 255, Laws of 1927, be amended to read as follows: That the remainder of the special motor vehicle tax now provided by law or which may be hereafter provided by law after the fee for registration has been sent to the secretary of state or other official designated by law to receive the same, shall be applied to the construction, improvement, reconstruction and maintenace of highways in the state and shall be transmitted monthly by the county treasurers of the various counties to the state treasurer, and together with the motor vehicle fuel tax provided by law for the construction, improvement, reconstruction and maintenance of highways in the state, shall be by the state treasurer placed in the highway fund. On the first day of April, 1929, the unexpended balances remaining in the various funds provided by section 7, chapter 255, Laws of Kan-

sas, 1927, except the funds applied to county and township roads, shall be transferred and paid to the state treasurer and by him credited to the highway fund: Provided, Such sums, transferred from the county and township road funds or from the funds allotted to the counties from the county free fund, shall be expended by the state highway commission within the respective counties from whence same are paid. All funds received by the various counties from the sale of benefit district bonds heretofore or hereafter issued, under the provisions of Revised Statutes 68-701 to 68-709 and amendments thereto, shall be transferred by the county treasurers to the state treasurer and by him placed in the highway fund; and such amounts shall be expended in the counties from which they are received and for the purposes for which said bonds were issued: Provided, That nothing in this act shall be construed to relieve any county in which a benefit district has been organized under the provisions of sections 68-701 to 68-709 inclusive Revised Statutes 1923 and amendments thereto from the duty and liability to issue and sell bonds under the provisions of said act in the amount necessary to pay such part of the cost of the construction of such benefit district roads in said benefit district required by said act to be paid by the county, township and benefit district. Any unexpended balance remaining in the fund in which is placed that part of the fees for registration sent to the secretary of state or other official designated by law to receive the same, and appropriated for use in the administration of the motor-vehicle registration act, unexpended at the time

this act takes effect or at the end of any calendar year, shall be placed in the highway fund. The highway fund shall be apportioned as follows:

(1) There shall be paid from the highway fund the sum or sums appropriated by the legislature not exceeding for any one year $500,000 for the support and maintenance of the state highway commission and the state highway department, including salaries, traveling expenses and all other expenses connected with or incident to the work of the state highway commission and the state highway department.

(2) The sum of $800,00 quarterly up to April 1, 1930, and the sum of $900,000 quarterly on and after April 1, 1930, shall be transferred by the state treasurer from the highway fund into a fund known as the county and township road fund which shall be distributed to the 105 counties as follows: 40 per cent shall be distributed equally to the 105 counties of the state and 60 per cent shall be apportioned and distributed to the 105 counties of the state in proportion to the assessed valuation based upon the preceding year's assessment. The fund thus distributed to the various counties shall be used for the construction, improvement, reconstruction and maintenance of county and township roads and bridges at the option of the county commissioners: Provided, That not less than 50 per cent of said fund shall be used on township roads and bridges and shall be divided among the various townships in each county in the proportion that the mileage of township roads in the various townships bears to the total mileage of township roads in the county:

Provided, That in counties which have adopted the county unit system said fund shall be divided between the county road fund and the county bridge fund in such proportion as the board of county commissioners shall determine. From and after April 1, 1929, the state highway commission shall not have any jurisdiction or control over any roads or bridges except on the state highway system, or the funds hereunder distributed to counties for county and township roads, or other road funds available to the counties and townships.

(3) There shall be apportioned the sum of $700,000 quarterly to the 105 counties as follows: 40 per cent shall be apportioned equally to the 105 counties of the state and 60 per cent shall be apportioned among the 105 counties of the state in proportion to the assessed valuation based on the preceding year's assessment, this fund to be used by the state highway commission in the county to which it is apportioned as follows: First, where roads on the state highway system have been built under the benefit district plan to payment and reimbursement of benefit district assessments as provided in section 18 of this act; and for the payment of the principal sum of outstanding warrants issued by any county for the construction, improvement or reconstruction of the state highway system; second, for maintenance of that portion of the state highway system within the respective counties; third, for construction of state highways: Provided, That not more than 50 per cent of the remainder of the fund allocated to such county under the provisions of this paragraph shall be used in any one year for con-

struction of state highways in such counties until reimbursement has been made to the townships, and to the counties as hereinafter set out; fourth, for reimbursement (a) to townships, and (b) to counties, as provided in section 18 of this act.

(4) The state highway commission shall annually apportion and distribute quarterly to cities on the state highway system from the highway fund at the rate of two hundred and fifty dollars per mile for the maintenance of streets in said cities designated by the state highway commission as connecting links in the state highway system, said moneys to be credited to the street and alley funds of such cities. In lieu of said apportionment the state highway commission may maintain such streets in cities of the third class and pay for such maintenance from the highway fund.

(5) All of the remainder of such highway fund shall be used by the state highway commission in the construction, improvement, reconstruction, and maintenance of the state highway system: Provided, That the state highway commission shall not construct more than one hundred miles of high type pavement in any one year until all the roads of the state highway system have been improved with an all weather surface such as sand, gravel or chat.

All apportionments and distributions provided for by this section shall be made quarterly on the first days of January, April, July and October of each year.

Sec. 18. That section 9, chapter 255, Laws of 1927, be amended to read as follows: The state highway com-

mission shall apply that portion of funds provided for reimbursement by number 3 of section 17 of this act first to the payment of the installments of the benefit district tax assessed on the property in such benefit districts as the same become due and to the reimbursement to the taxpayers of all assessments made and collected on such lands and improvements but not more than one of the assessments made and collected or payments as they become due shall be reimbursed to the taxpayers in the district in any one year. Such payments and reimbursements to be made in full upon the land and improvements which lies one (1) mile or more from the road for which the benefit district tax was assessed, and upon the lands and improvements which lie within one (1) mile of such road in the amount equal to 80 per cent of said assessment, except however, that when the road for which the benefit district tax was assessed is a gravel, sand, sand clay or road of like class, then the reimbursement upon the land and improvements which lie within one mile of such road shall be in an amount equal to 50 per cent of such assessments: Provided, That if, in any year, the funds from which such payments and reimbursements are to be made shall be insufficient to make such payments and reimbursements in full, the state highway commission shall prorate said fund among the several benefit district taxpayers, and the balance of said payments and assessments shall thereafter be reimbursed: Provided further, That when no tax or assessment has been levied against the lands and improvements in said benefit districts, the state highway commission shall pay the portion of the

cost chargeable to the lands and improvements in such benefit districts, in which event no special assessments shall be levied against the lands in said benefit district or districts: Provided further, No interest shall be paid under this section to any person, to any township or to any county: And provided further, The state highway commission shall not be bound to reimburse to any township or to any county (under the benefit district plan) more than 5 percent of the amount found to be due such township or county under this act, in any one year, but the state highway commission may in its discretion reimburse any such township or county the whole or any larger part found due such township or county, however, the state highway commission shall not make any reimbursement to any township or to any county unless such reimbursement can be made under the order of apportionment and out of the fund as provided in number (3) of section 17 of this act: Provided further, The right to reimbursement under this act shall not be assignable separate from the sale of the land and no reimbursement in any amount shall be made or paid to any person who has acquired the claim for reimbursement separate and apart from the real property.

Sec. 19. That on April 1, 1929, the boards of county commissioners of the various counties shall transfer to the state highway commission and deliver to its authorized representatives all machinery, equipment and road materials which said counties have heretofore purchased from the county and state road fund of such counties for use on state highways. That on April 1, 1929, the state

highway commission shall assume the rights and liabilities of the various counties on all existing contracts for the construction, improvement, reconstruction or maintenance of state highways and bridges and for the purchase of machinery, equipment or material for use on state highways.

Sec. 20. That section 13, chapter 255, Laws of 1927, be amended to read as follows: That if any section, clause, sentence, paragraph, part or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section, clause, sentence, paragraph, part or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections, clauses, sentences, paragraph, parts or provisions may be found invalid by any court.

Sec. 21. That section 12, chapter 255, Laws of 1927, be amended to read as follows: In administering and carrying out the provisions of this act, the state highway commission shall be governed by the highway laws of the state so far as possible, and for the purpose of administration of this act all Kansas statutes referring to roads not in conflict with the act shall also apply to state highways.

Sec. 22. Original section 74-2002 and 68-150, Revised Statutes of Kansas for 1923, and original sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, chapter 255, Laws of Kansas, 1927 are hereby repealed.

Sec. 23. Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge or culvert on, or defect in a state high-

way, not within an incorporated city, may recover such damages from the state of Kansas; that is to say, such recovery may be from the state when the director of highways, or state highway engineer, or any member of such state highway commission, or any foreman, patrolman, or other employee in charge of the construction, maintenance or upkeep of such highway, shall have had notice of such defects five days prior to the time when such damage was sustained, and for any damage so sustained the injured party may sue the state highway commission, and any judgment rendered in such case shall be paid from any funds in the state highway fund on the order of the state highway commission. For any damage so sustained action may be brought in the District Court of the county in which such damage was sustained, or in the District Court of the county of which the plaintiff is an actual resident at the time of the sustaining of such damage; and upon the filing of such action in such court a summons shall issue out of such court directed to the sheriff of Shawnee County, Kansas, for service, and service thereof shall be made by delivering to the director of highways personally a copy of such summons, or by leaving a copy of such summons at the office of such director of highways, in Shawnee County, Kansas; Provided, That no such action shall be maintained unless within ninety days after the sustaining of such damage, written notice, stating the date, when, and place where such damage was sustained, the name and correct post-office address of the person sustaining such damage, and the character of the damage sustained, shall be served

upon the director of highways, either in person or by registered mail at his office in Topeka, Shawnee County, Kansas: Provided further, That the action must be commenced within two years.

Sec. 24. That this act shall take effect and be in force from and after April first, 1929, and on its publication in the official state paper.

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CHARLES ELMORE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS,
APPELLEE.

APPEAL FROM THE SUPREME COURT
OF KANSAS.

APPELLEE'S STATEMENT OF STATUTORY AND LOCAL LAW.

WINT SMITH,
OTHO W. LOMAX,
Counsel for Appellee.

KELLEY BRIEF PTG. CO., TOPEKA

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PANHANDLE EASTERN PIPE LINE COMPANY,
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THE STATE HIGHWAY COMMISSION OF KANSAS,
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APPEAL FROM THE SUPREME COURT OF KANSAS.

STATEMENT OF STATUTORY AND LOCAL LAW.

Justice Burch of the Kansas Supreme Court handed the following informal order to the Clerk of the Court at the close of the session at which this cause was argued below:

> "31804 Highway Com. v. Pipeline Co.
> The parties are requested to furnish the court citations to the revised statutes 1923, Supplements, and session laws not covered by supplement, relating to pipe lines—simply a citation as R. S. 1-102, but all citations whether apparently pertinent or not."

We interpret the order of this Court restoring this cause to the docket as embracing to some extent the same request and we therefore file this separate statement on statutory and local law.

Statutes Relating to Corporations Generally.

R. S. 1933 Supp. 17-202 defines the purposes for which a corporation may be created. Clause 22 reads as follows: "The construction and maintenance of a telephone line". Clause 32: "The transportation of goods, wares or merchandise or any valuable thing". Clause 54: "For the transportation of sand by pipe lines."

The latter clause is the only place in that statute where the words "pipe lines" may be found.

R. S. 17-501 provides in part:

> "Any corporation organized under the laws of any other state, territory or foreign country and seeking to do business in this state shall make application to the State Charter Board upon blank forms supplied by the Secretary of State for authority to engage in business in this state as a foreign corporation. Such application shall set forth *** (4) The full nature and character of the business the corporation proposes to conduct in this state; *** "

R. S. 1933 Supplement, 17-403 provides in part:

> "The charter board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted, and a certifi-

cate setting forth that the application has been approved shall be endorsed upon the application and signed by the members of the charter board approving the same: *** "

R. S. 17-505 provides as follows:

"Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state."

Following the provisions of these statutes appellant, the Pipe Line Company, on May 21, 1930, filed in the office of the Secretary of State its application for permission to engage in business in the state of Kansas. Here follows section "Fourth" as written in the application:

"The full name and character of the business in which said corporation proposes to engage within the state of Kansas is the transportation of natural gas through pipelines and the delivery of the same to distributors both within and outside of the state of Kansas."

As a part of the application as required by law appellant filed a certified copy of its Delaware charter, which is dated December 23, 1929, and which instrument contains no specific reference to any right to intersect or occupy any public highway, public lands or waters. Pertinent rights granted by this charter are:

"(b) To construct and maintain conduits and lines *** for the transportation of natural gas or oil *** .

"(d) To acquire *** construct *** own *** operate *** pipe lines."

Section "f" is a broad statement of power to own real estate, easements, rights of way and other interests in land.

"(o) To do all and everything necessary, suitable and proper for the accomplishment of any of the objects or the furtherance of any of the powers hereinbefore set forth *** ."

The application was approved May 21, 1930, by the State Charter Board and a certificate issued as follows:

"STATE OF KANSAS
Office of the Secretary of State

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That the Panhandle Eastern Pipe Line Company a foreign corporation, organized under the laws of the State of Delaware, has complied with the laws of the State of Kansas relating to such corporations, and is authorized to engage in business in this State as a foreign corporation.

Witness my hand and seal.

E. A. Cornell
Secretary of State

Done at the City of Topeka, this Twenty-first day of May, 1930"
(Seal)

The general powers of corporations are enumerated in R. S. 17-601:

"Every corporation, as such, shall have power: (1) To have succession, by its corporate name, for the period limited in its charter, and when no period is

limited, for fifty years. (2) To maintain and defend judicial proceedings. (3) To make and use a common seal and alter the same at pleasure. (4) To hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire, in order to obtain or secure the payment of any indebtedness or liability due to or belonging to the corporation. (5) To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them suitable compensation. (6) To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock. (7) To enter into any obligation or contract essential to the transaction of its ordinary affairs. (8) To change its corporate name, without in anywise affecting its rights, privileges, or liabilities."

Power of Eminent Domain.

Section 1, Article 12 of the Constitution of the state of Kansas reads as follows:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

Section 4, Article 12:

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

The latter section has been held not to apply to property taken for public use but only to railroads and to private corporations. Pottawatomie County v. O'Sullivan, 17 Kan. 58; Collen v. Junction City, 43 Kan. 627; Buckwalter v. School District, 65 Kan. 603; Railway Company v. City, 95 Kan. 471.

R. S. 17-618 reads as follows:

> "Lands may be appropriated for the use of macadam-road, plank-road, hospital corporation or association, telegraph, hydraulic, irrigating, milling and other manufacturing corporations using power, oil companies, pipeline companies, and for the piping of gas in the same manner as is provided in this article for railway corporations as far as applicable, and any macadam-road, plank-road, telegraph, hydraulic, irrigating, oil company, pipeline company, gas company, milling or manufacturing corporation using power desiring the right to dam or take water from any stream, to conduct water in canals or raceways or pipes, or to conduct compressed air in pipes, or to conduct oil in pipes or conduct gas in pipes, or transmit power by shafting, belting, or belting and pulleys, or ropes and pulleys, or by electrical current, or by compressed air, may obtain such right or the right of way for all necessary canals, raceways, pipes, shafting, belting and pulleys, ropes and pulleys or wires in manner as aforesaid; and such canals, raceways, pipes, shafting, belting, belting and pulleys, ropes and pulleys or wires may be laid, carried or stretched on, through or over any land or lot, or along or upon any stream of water, using so much of the water thereof as may be needed for any of the purposes aforesaid, or through any street or alley or public ground of any city of the second or third class: Provided, That no such canal or raceway shall be located through any street or alley or any public ground of any city without the consent

of the municipal authorities thereof: Provided further, That it shall be unlawful for any person or corporation to locate or construct any irrigating canal or raceway along or upon any stream of water or take and use the water of any stream in such manner as to interfere with or in any wise hinder, delay or injure any milling or irrigating improvements already constructed of located along or upon any stream of water, or to diminish the supply of water flowing to or through any established irrigating canal: Provided further, That in case of the erection of a dam, the report of the commissioners, instead of defining the quantity and boundaries of the land overflowed, shall designate particularly the height of such dam. (L. 1891, ch. 85, §1; L. 1899, ch. 95, §1; L. 1091, ch. 128, §1; L. 1917, ch. 122, §1)"

R. S. 26-101 prescribes the method of procedure which may be exercised by pipe line companies.

R. S. 66-906 and 66-907 prescribes proceedings originally intended to apply only to railroad companies.

Pipe line companies may proceed in condemnation under either statute. Knox v. Great Lakes Pipe Line Company, 135 Kan. 170, 172. The validity of condemnation proceedings by a pipe line company was challenged because the width of the right of way was not described in the case of Love v. Empire Natural Gas Company, 119 Kan. 374, 377:

"It is true, as plaintiff contends, that in condemning a right of way for a railroad the proceedings must show the land taken, including the width of the right of way. However, an appropriation for a right of way for a railroad vests in the railroad company the right to the surface of a strip of land with all the trees and soil necessary for the con-

struction, maintenance and operation of its railroad. It may appropriate sufficient of the surface for its main tracks, sidetracks, depots, water tanks and other necessary appliances, and for these purposes its right of occupancy is exclusive. It is therefore essential that the extent of the land taken shall be definitely determined. In an appropriation for a pipe line the surface of the land is not taken. The pipes are buried in the ground at a depth which will not interfere with the use of the land for agricultural purposes, and the surface may thereafter be used by the owner. After the line is constructed the surface will not be used by the company except for inspection and for occasional repairs when they become necessary. The use for pipe-line purposes, therefore, differs materially from that of a railroad right of way, and probably in view of this difference the legislature made an exception and provided that the mode and manner of condemning a right of way for a railroad should be used only so far as they were applicable."

The uncompensated right to use certain city streets for pipe lines was challenged in LaHarpe v. Gas Company, 69 Kan. 97. We quote from the opinion written by Chief Justice Johnston, pages 102, 103:

"In this statute the privilege of laying gas-pipes in the streets, alleys and public grounds of cities of the second and third class is directly conferred on corporations organized to produce and distribute gas. The power to confer the privilege and to prescribe the conditions upon which it may be exercised is not delegated to the city, nor is its consent required. In the section questioned, the legislature, after providing for the condemnation of a right of way for canals, race-ways, and pipes, as well as shafting, belting, pulleys, and wires, through streets, alleys and

public grounds of cities, added 'that no such canal or race-way shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof.' (Gen. Stat. 1901, §1366.) In effect, this was a declaration that the consent of the city was not necessary to the exercise of any of the other uses mentioned. Having the question of municipal consent under consideration in the conduct of water by canals and raceways, of gas and air by pipes, of electricity by wires, and the transmission of power by shafting, belting and ropes through the streets, alleys, and public grounds, it made the consent of the municipality essential only as to the conduct of water in canals and raceways, and by the clearest inference indicated that such consent should not be necessary in any other case.

"It is argued with much force that the interests and safety of the public would be better subserved if excavations could not be made, and pipes could not be laid, in the streets of a city except with the consent and under the supervision of municipal officers. If we were acting in a legislative capacity we might readily agree with this claim, but that is a matter for the determination of the legislature alone, which, as has been said, is the 'master of its own discretion.' In the control of the streets and highways the power of the legislature is supreme and unlimited, except so far as it may be restricted by constitutional provisions."

Generally, as to the right of pipe line companies to occupy highways with their lines, see State v. Natural Gas Company, 71 Kan. 508. The court says at page 509:

"The right of the gas company to bury its pipes in the public highway for the transportation and distribution of gas depends largely upon the effect such use would have on the subsequent use of the

highway as a thoroughfare for public travel. It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee-owners any right to use the public highway for any purpose. Its use belongs to the public and not to the owners of adjoining property. It is true that there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another any right to occupy the highway for any purpose."

Also on page 510:

"The contention of the state is that the use which the gas company is making of the highway is exceptional, and may be exercised only under a franchise from the state, mediately or immediately. We think this is an overstatement of the proposition. The use is not exceptional. The transportation of commodities on the highway is one of the uses for which it has always been maintained. The means, however, used by the gas company in the transportation of its gas are exceptional. A demand for this method has not heretofore existed in this state; but shall this fact alone deprive the defendant of the use of the highway for a usual and proper purpose, unless such use necessarily obstruct, seriously inconvenience or endanger public travel? In McCann v. Telephone Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, it was held that the use of a rural highway by a telephone company was not an additional servitude for which the owner of the fee could recover compensation. Speaking of the general use of a highway, the court said:

'It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication *** . The use is not to be measured by the means employed by our ancestors, or by the conditions which existed when high-

ways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply.' (Page 213)"

The syllabi in the case of State v. Weber, 88 Kan. 175, are as follows:

"1. The transmission of an electric current by wire on a highway in order to furnish light, heat and power to the inhabitants residing along such electric line is a legal and proper use of a highway.

"2. A person may build and maintain such a line on a rural highway without having obtained a franchise or special license from any officer, providing it is done in a way that will not seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public and there is no invasion of the rights of the owners of abutting lands.

"3. If such a line should be so built and maintained as to substantially interfere with the legal and proper use of the highway by others of the public, or if the appliances set up and used in the highway constituted a nuisance, the state, at the instance of the attorney-general or county attorney, might maintain an action to enjoin the continuance of the nuisance or the further illegal use of the highway."

Statutory Obligations.

Beyond the provisions of the statute, R. S. 1933 Supp., 68-415, the validity of which is challenged in this case, there are absolutely no statutory obligations or regulations imposed upon pipeline companies with respect to the manner of the construction, maintenance or opera-

tion of their lines, whether located upon, along or across public highways or private lands. There are statutes which refer to pipelines and these will be listed hereafter but they cannot have any application in this controversy. The only statutes relating to the manner of the occupancy of the public highways by transmission lines of any nature (other than railroads) are as follows:

> R. S. 17-1901: "Poles, wires and fixtures. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters."
>
> R. S. 66-183: "Wires along highways. All public utilities owning or operating wires for the transmission of telegraph or telephone messages or for the transmission of electricity upon, along, or across the streets, highways or public places in this state are required to so use, string and maintain such wires as to avoid unreasonable injury or interference from the wires of other utilities and to avoid unreasonable injury to and interference with the wires of other utilities, and the public utilities commission is given the power, and it is hereby made its duty, to prescribe reasonable rules and regulations with respect to the stringing and maintaining of wires in all cases where there is danger or possibility of unreasonable interference with or damage to the wires or service of one utility by those of another utility and with respect to the support, maintenance; repair and reconstruction thereof, which rules shall be furnished to any interested person upon application to the public utilities commission, and the

public utilities commission is given the power, and it is hereby made its duty to prescribe reasonable rules and regulations with respect to the stringing of wires, electric or otherwise, which cross over or under the tracks of any railroad company and with respect to the support, maintenance, repair and reconstruction thereof, which rules shall be furnished to any interested person upon application; but in no case shall the height of any wires which cross above the tracks of a railway company be less than twenty five feet from the top of the rails, except trolley and feed wires of electric railroads, which wires shall be not less than twenty two feet above the tops of the rails."

Other statutes relate to city streets.

The Public Utilities Act.

The Public Utilities Act, Chap. 66 R. S. 1923, relates generally to public utilities and the fixing of rates and of public service regulations by the Public Utilities Commission (now the State Corporation Commission, ~~Chap. 66~~ R. S. 1933 Supp. 74-602.

R. S. 66-156 authorizes the Public Utilities Commission to:

" *** from time to time carefully examine and inspect the condition of each public utility and common carrier, and of its equipment and the manner of its conduct and the management with reference to the public safety and convenience. *** "

R. S. 66-157:

"Whenever in the judgment of the public utilities commission it shall appear that any corporation or company operating a public utility or common car-

> rier *** or whenever in the judgment of the commission any repairs are necessary upon its road, or any addition to its rolling stock or other equipment, or any addition to or change of its stations, station houses, or other buildings or equipment, or any change in its rates for transporting passengers or freight, or for furnishing any other service, or any change in the mode of operating or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commission shall inform such company or corporation of the improvements and changes which they deem to be proper by a notice thereof in writing, ***. "

We interpret the latter two sections as intended to apply only to railroads and to public utilities who enjoy municipal franchises in cities.

The Kansas Supreme Court has said in regard to these two statutes:

> "Pending the decision of this case argument was invited on this question: Has the state public utilities commission jurisdiction to inquire into and determine whether or not the means taken or about to be taken by a railroad company to restore a highway which is crossed by its track to a suitable condition for travel are such as to meet the requirements of the situation; and if they are found unsuitable, to direct the company to construct a crossing upon plans determined by the board to be essential to the safety of the traveling public? Each party has expressed the belief that no such power is possessed by the board. Only one side of the question having been argued, no decision of it is made."
>
> State, ex rel. v. Railway Co., 95 Kan. 22, 30-31.

Later it was held that the utilities commission was without authority to enforce an order made by it regarding a farm crossing in the case of Railway Company v. Utilities Commission, 98 Kan. 667, wherein it was said:

> "And yet we see so many expedient reasons why the public utilities commission should have primary control of matters of this sort. If no central state control is exercised over the construction of private farm crossings (and there must be hundreds of them in this state), there may be defective construction of crossings; there may be so many of them that the safe and expeditious transportation of passengers and property will be seriously impeded and human life imperiled. These considerations would almost tempt a court to read this power into the statutes conferring authority upon the commission to regulate and supervise the affairs of the railroads. We must not do so, however, for we know very well that such is the business of the legislature and not of the judiciary."

The two sections referred to above have been amended since the two cases last above cited were decided, but they were only amended to include all public utilities as defined in R. S. 66-104 and common carriers as defined in R. S. 66-105.

R. S. 66-104:

> "The term 'public utilities' as used in this act shall be construed to mean every *** company *** that *** may own, control, operate or manage, except for private use, any equipment *** for the transmission of telephone messages *** or the conveyance of oil and gas through pipe lines in or through any part of the state *** ."

R. S. 66-105:

> "The term 'common carriers', as used in this act, shall include all railroad companies, *** pipe line companies and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state."

We conclude that because the public utilities act was enacted to provide control of rates and services and because of the purely interstate character of appellant's business, none of the terms of the Public Utilities Act apply to appellant.

Miscellaneous Statutes Involving Transmission Lines.

R. S. 12-841 refers generally to cities and franchises for public utilities.

R. S. 12-842 authorizes cities of the second or third class to place pipelines, wires and other equipment for transportation of natural gas, petroleum, oil, electric current and water along and across any of the public roads, highways and streets. This statute provides that such lines shall be placed "in such manner as not to incommode the public in the use of such roads, highways and streets.

R. S. 12-844 authorizes cities of the second and third class to maintain transmission lines between various water, power or other plants and the city where the pumping or generating plants are located outside of the city limits.

R. S. 12-845 provides for condemnation for right of way for pipelines intended for city use.

R. S. 12-846 relates to procedure.

R. S. 12-849 authorizes city of the second or third class, by ordinance, to grant various transmission companies the right to enter streets and alleys, public parks and grounds of the city.

R. S. 12-106 relates to franchises for public utilities as also does

R. S. 13-434.

R. S. 13-432 defines punishment for persons found guilty of interfering with public utilities' property.

R. S. 13-1201 to 13-1204 relates to public utilities.

R. S. 13-2801 and 14-1701 relate to franchises for public utilities in cities.

R. S. 55-101 authorizes the owners of land not within an incorporated city which has been platted in lots and blocks to install, maintain and operate in the streets dedicated by the owners, lines for the transmission of electricity and fuel. This applies only to the owners of sub-divisions.

R. S. 55-208 refers to liens of sub-contractors.

R. S. 55-306 relates to the county gas inspector, an appointive county office which has long since been forgotten. It provided for a gas inspector to inspect natural gas pipelines, to discover leaks therein and require their repair.

R. S. 55-307 makes it unlawful for any person or persons to refuse to permit the gas inspector to inspect natural gas wells or pipelines.

R. S. 55-501 declares all pipelines built or maintained for the conveyance of crude oil within the State of Kansas to be common carriers.

R. S. 60-505 refers to causes of action against common carriers.

R. S. 79-422 relates to taxation of utilities.

R. S. 79-701 to 79-711 relates to taxation of wire, power and pipeline companies.

R. S. 17-623 relates to sewer corporations in cities.

R. S. 13-806 to 13-808 applies to city waterworks.

R. S. 44-505 extends the application of the Workmen's Compensation Act to pipeline companies.

R. S. 55-207 creates a lien for labor and material.

CONCLUSION.

Aside from statutes relating to city streets and public utilities owned by municipal corporations, appellee submits that R. S. 17-1901 relating only to "magnetic telegraph lines" is the only statutory authority in Kansas, beyond the statute in question in this case, which purports to either regulate or authorize the occupancy of public highways by either pipe lines, pole lines or transmission lines of any similar nature. True, the highest court of the state has held such uses to be proper where they do not necessarily obstruct, seriously inconvenience or endanger public travel. That court has, as we have seen, on several occasions mentioned the advisability of statutory regulation, yet until the enactment of the statute here challenged, the subject has entirely escaped legislative action.

Appellant enjoys all of the rights and privileges extended in Kansas to any business corporation whether organized in that state or elsewhere. Further than these rights it may and does occupy any and all highway right of way, public lands and waters necessary for its purposes. The State of Kansas has in excess of 124,000 miles of public highways and actually furnishes thousands of miles of free right of way for pipe lines, telephone, telegraph and electric power lines. The act in question applies only to state highways which are the principal highways of the state and compose a system of 8690 miles. The state has extended to all such companies the right of eminent domain, ordinarily exclusively a sovereign perrogative.

Even in the absence of statute or judicial requirements, transmission companies similarly situated would seem to be under moral duty to in some manner reciprocate for the extraordinary rights and privileges which the state has so generously and freely bestowed.

It is not unreasonable to assume that when appellant applied for authority to do business in this state and commenced construction of its pipe and private telephone line, it knew it must of necessity cross and intersect railroads, private easements of others and public highways; that it knew that public highways sufficient a few years ago are insufficient today and that further changes will be required by public necessity as units of transportation are improved and become more numerous; that it knew that the old familiar right angle turns

on highways were being eliminated by the acquisition and utility of new and additional right of way.

Appellant admits that it will be unnecessary for it to acquire new right of way to accommodate necessary structural changes in its lines. In other words the uses of the parties in the same land are in no wise inconsistent except where considerations of public safety require structural alterations in its lines as well as in the design and location of public highways. Under these circumstances did not appellant acquire its rights from the state and its rights in land subject to the changing needs and requirements of the public and the needs and requirements in the interest of its safety?

Respectfully submitted,

THE STATE HIGHWAY COMMISSION OF KANSAS,
By WINT SMITH,
Assistant Attorney General,
Topeka, Kansas,
OTHO W. LOMAX,
Topeka, Kansas,
Its Attorneys.

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CHARLES ELMORE CRO

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

STATE HIGHWAY COMMISSION,
APPELLEE,
(Petitioner).

PETITION FOR REHEARING.

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KELLEY BRIEF PTG. CO., TOPEKA

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PETITION FOR REHEARING.

Comes now the above named appellee, the State Highway Commission of Kansas, and presents this, its petition for a rehearing, in the above entitled cause, and in support thereof respectfully shows:

The opinion of this court delivered on April 1, 1935, seems to turn entirely on a question of substantive law. The determination is that the pipelines and polelines of appellant, when located on private easements, are not subject to the exercise of the police power for the present purposes of the State Highway Commission of Kansas. The court determines that insofar as the questioned statute relates to highways to be relocated or laid out

in the state over land burdened by private easements of appellant, that the statute is in violation of the due process clause of the 14th amendment to the constitution of the United States. Appellee respectfully states that the brief of the appellant, filed in this court on December 3, 1934, in reality presents but two questions,

1. Whether the challenged statute is invalid because of its failure to provide for notice and a hearing to be had before the State Highway Commission prior to the issuance of an order requiring structural changes in transmission lines, such as those owned by the appellant;

2. Whether the statute denied appellant the equal protection of the law.

The latter question was not seriously presented either in oral argument or in the briefs filed. Appellee filed its brief herein and dealt almost exclusively with the questions presented by the brief of the appellant. A very short statement was inserted in the back of appellee's abstract on the question of whether or not the statute was a valid delegation of the police power. On the day prior to the argument herein, appellant filed a reply brief wherein it treated more at length the question of whether there had been a valid delegation of police power, however, from the cases cited, appellee concluded that the brief contained a confusion of the power of eminent domain and police power and its only attempt to answer this argument was in the oral argument herein.

Appellee therefore respectfully submits that the principal question upon which this case was decided has not

been fully briefed by either party and that it is apparent from the briefs of the parties as well as the admissions contained in the appellant's answers to the alternative writ of mandamus issued in the lower court that both parties believed that the subject was properly one for legislative action.

The opinion in this case contains the following:

> "The record fails to disclose that appellant's lines were the cause of serious danger to the public. Whatever of this, if any, would follow extensions of the highways across them is not comparable to the hazard incident to the operation of railroad trains."

Again,

> "The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public."

> "New Orleans v. Drainage Commission, 197 U. S. 453, and similar cases concerning pipes in public streets are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality."

We wish to submit that there is nothing contained in the record about the "seriousness" of the danger involved, however it was admitted that the changes contemplated were necessary in the interest of public safety if highways were to be constructed and opened to the

public. Further, the necessity for the construction of the new highways and for the widening of existing highways was expressly admitted. The danger involved results only from improper construction or location of pipe or pole lines where the land occupied is burdened by both pipeline (or poleline) and highway easements. This court says:

> "The 24-inch high pressure natural gas transmission line of appellant, when buried beneath the surface of such highways, certainly is not a constant hazard to vehicular traffic."

The appellee in this case is attempting to avoid any constant hazard to vehicular traffic by requiring the lines to be buried beneath the surface of such highway to such a depth as to remove the hazard and also to require such line to be encased to avoid danger incident to open excavations necessary to pipeline repairs or removal. In the briefs and arguments, all parties seemed agreed that the changes sought to be required are necessary and if this case is to turn on the degree of danger involved, we respectfully submit that that question is properly a question of fact to be determined as other facts.

Natural gas is ordinarily and quite universally considered by the courts as a dangerous instrumentality. A few days before this case was argued in this court, and specifically on February 1, 1935, three of appellant's employees were killed because the 24-inch pipeline burst at a point near Minneola, Kansas. It is our understanding that the pipeline was being uncovered for some

purpose and that it burst from pressure within. Accidents similar to the one mentioned are more or less familiar to all people who live within the gas producing portions of the United States.

The matter of requiring, as a prerequisite to the exercising of the police power of the state, a finding of "serious danger" comparable to that assumed to exist at railroad crossings is a new thing in law, an apparent departure from established precedent and a matter of vital public concern.

In the recent case of Nashville, Chattanooga & St. Louis Railroad vs. Walters, Case No. 183, October Term, 1934, 79 L. ed. 458, 55 Sup. Ct. 486, head note #4 is as follows:

> "Police power embraces regulations designed to promote public convenience or general welfare and not merely those in the interest of public health, safety and morals."

We take this to be the general rule and that this case is the first one wherein the finding of "serious danger" has been deemed necessary.

The case of Erie Railroad v. Board of Utility Commissioners, 254 U. S. 394, is the consolidated opinion in eight cases coming to this court from the State of New Jersey on eight writs of error. The cases are all disposed of in one opinion. From what appears in the reports it would seem that the private easements of a water company were involved; that the private wires of the Western Union Telegraph Company were involved; that certain private spur tracks and loading facilities

were involved; all of these cases arising out of one railroad grade crossing elimination project. The cases were all treated exactly alike in this court. The same principles were applied to the pipes and poles as to the railroad company and to the other interested parties.

The case of C. B. & Q. Railroad Company v. Illinois, 200 U. S. 561, involves the action of a certain board of drainage commissioners who were engaged in deepening the channel of a natural watercourse. This plan necessitated the replacement of a bridge that was part of the railroad company's property. This bridge supporting the railroad tracks had been built for about forty years and was in all respects sufficient when built. We quote from the opinion of the majority of this court, on page 592:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public

> health, the public morals, or the public safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. ed. 525, 527; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 24 L. ed. 529."

Mr. Justice Brewer dissented on the ground that the railroad company was receiving no benefit from building a larger bridge and that it was being charged with the cost of reconstruction, about $13,000, all "in order to improve the value of lands belonging to private owners in this drainage district, when, if a highway crossed at the same place and a new bridge or culvert was required, the cost of it would be paid out of the public funds. I cannot conceive how this can be looked upon as "the equal protection of the laws"

The dissent, therefore, was not based on the due process clause.

The case of West Chicago Street Railway Company v. Illinois, 201 U. S. 506, held:

> "A judgment requiring a railroad company to lower or remove a tunnel under a navigable river, which when constructed did not interfere with navigation but which at present obstructs navigation by larger vessels, does not impair any contract obligation, when the ordinance under which the tunnel was constructed contained no clause or provision which so restricted the power of the city that it could not require the railroad company to lower or remove the tunnel when the public interests, as involved in the unobstructed navigation of the river, demanded that to be done."

The court said at page 526:

> "This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the constitution, but is only the result of the lawful exercise of the governmental power for the common good."

The general principle was stated in the now famous case of C. B. & Q. Railroad Company v. Chicago, 166 U. S. 225. The court said on page 252:

> "The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567 (38: 269, 273), this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impair-

> ment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. 'The governmental power of self protection', the court said 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' See New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 671 (29: 516, 524)."

The requirement of the drainage board for a larger bridge under the tracks of the railroad company in order to permit drainage of low, swampy lands, as required in C. B. & Q. Railroad Co. v. Grimwood, supra, did not involve any question of the seriousness of supposed danger to the public and the lack of such danger was admitted. Also in West Chicago Street Railway v. Illinois, supra. There can hardly be said to be any serious danger to the ordinary traveling public in the existence of the street railway company's tunnel under the river, which tunnel ~~had~~ been sufficient for public purposes for many years and became insufficient only because of the increased size of vessels desiring to navigate the river in question. Such is the case at bar. The highways which the appellee is now building were not necessary when the original highways were laid out. Public safety and public convenience have now required that new highways be built and that old highways be straightened and widened in order to accomodate modern vehicular traffic. The appellant, pipeline company, ac-

cepted its franchise from the state, well knowing that such changes would of necessity be made. It accepted its franchise knowing that it must cross public highways and public property and well knowing that unless properly constructed along public highways, its lines would be dangerous to the traveling public. It was recognized that similar changes would have to be made. The company obtained its charter subject to the statute now complained of. This fact was admitted in oral argument. A very common highway problem is dealt with in the statutes in many states, which provide that the owners of hedge fences adjoining public highways, shall keep them trimmed. As stated by the Supreme Court of Kansas in Chaput v. Demars, 120 Kan. 273, 275:

> "Why trim hedges along public highways? High hedges obstruct the highways, causing snow to drift in them, prevent their drying out quickly after heavy rains, render the highways more difficult to keep in proper condition, obstruct the view and render them more dangerous. The state, under the exercise of its police power, may legislate to remedy all the conditions produced by high hedges.
>
> The law does not take property without due process of law, and does not deny the equal protection of the law. It does compel an owner of a hedge to keep it in a certain condition at a place where that property affects the public roads, and if he will not do so then the public authorities may do it for him and tax him with the cost of performing the labor."

Such statutes have been uniformly held to be proper exercise of the police power and certainly if the law is to be that the police power could be exercised for

the benefit of public highways only when there is an element of serious danger comparable with the assumed danger at railroad grade crossings, then all such statutes are unconstitutional as in violation of the due process clause. We assume that it will also follow that statutes requiring the gasoline pumps of filling stations to be erected at least a certain number of feet from the edge of the highway right of way may be also unconstitutional as presenting no problem of serious danger comparable with railroads projecting their new superdreadnaught trains over the country and across country roads. There is an endless chain of probable conditions which will give rise to serious conflict, public inconvenience and public hazard, if the exercise of police power is to be limited to circumstances comparable with those existing at grade crossings. It may be well argued that it is generally true when a motor vehicle is struck on a grade crossing, it is usually the fault of the driver, while when people are injured by fallen wires or natural gas explosions, they are usually injured by virtue of the sole fact that they were present at the time of the accident.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of the State of Kansas be, upon further consideration, affirmed.

Respectfully submitted,

WINT SMITH, Topeka, Kansas,
OTHO W. LOMAX, Topeka, Kansas,
Counsel for Appellee.

CERTIFICATE OF COUNSEL.

I, Wint Smith, counsel for the above named State Highway Commission of Kansas, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WINT SMITH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 412.—October Term, 1934.

Panhandle Eastern Pipe Line Co., Appellant. *vs.* State Highway Commission of Kansas.	Appeal from Supreme Court of Kansas.

[April 1, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Kansas Highway Commission, administrative agency of the State, without any proceeding in condemnation, ordered the appellant Company to make specified changes in its transmission lines. It refused. By an original proceeding in the Supreme Court, the Commission obtained a peremptory writ of mandamus directing compliance. The Company insists that to enforce the Commission's order would deprive it of property without due process of law, contrary to the 14th Amendment.

Judgment went for the Commission upon the pleadings; there is no dispute concerning the facts; the validity of the statute said to authorize the order is challenged.

Appellant, a Delaware corporation with power to construct and maintain conduits for transporting natural gas, obtained authority to do business in Kansas, May 21, 1930, and during that year purchased from the owners rights of way for pipes, auxiliary telephone lines, etc. Thereafter these were constructed; the gas passes in both interstate and intrastate commerce.

The Commission, created under c. 225, Acts of 1929, is charged with the duty to lay out, open, relocate, alter, redesignate and reestablish highways throughout the State. Section 16 of that statute (Supp. Rev. Stats. 1931, also 1933, Sec. 68-415)—copied in the margin*—undertakes to grant power to require removal of

*Chapter 225, Session Laws of Kansas, 1929.

"Sec. 16. Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state high-

abutments, wires and pipe lines and other fixtures now upon state highways from the present locations thereon to other designated parts of the right of way. Unless imposed by this section, there are no statutory obligations upon pipe line companies with respect to the construction, maintenance or operation of their lines, whether located upon public highways or private lands.

After the pipes were in operation—1933—the Commission adopted plans for new highways across the Company's right of way at six widely separated places. Permission of the owners of the fee to use the necessary land was obtained; but appellant declined to permit the use of its right of way.

Plans for the new highways called for material changes in the pipe and telephone lines at the crossings—removals, lowerings, casements—estimated to cost above $5,000. All parties admit that the Commission could not make these with reasonable safety; appellant was willing to do the work if promised repayment of the necessary expense. Purporting to act under Sec. 16, (Dec. 1, 1933), the Commission ordered it to proceed without compensation. That the proposed changes would be proper for new highways as planned is admitted; also that the estimated cost is reasonable. But appellant denied the existence of power to impose this expense upon it; and for that reason refused to comply with the order until the Commission should agree to refund the outlay.

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ways, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid".

In its opinion supporting the peremptory mandamus, the court below declared:

"The pipe line company's lines are all located on its own rights of way, procured from landowners, and none of the lines is located on, along, or across any previously existing highway".

"The highway commission has acquired rights of way for the highway improvements from landowners, but has not obtained consent of the pipe line company to cross or occupy its right of way. The highway improvements necessitate certain changes in the pipe line company's lines. In some instances it is necessary the pipe line be lowered and encased. In other instances it is necessary the pipe line and telephone line be removed to the outer edge of right of way newly acquired by the highway commission for the purpose of widening existing highways. None of the changes will require the pipe line company to acquire any new or additional right of way".

"The pipe line company contends that, because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained, and the present improvements had been initiated, it is entitled to compensation for all necessary expenditures incurred in making an adjustment of its private use to the later public use of the same rights of way".

"What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to co-users of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway was established before or after the privately owned structures were established".

"There is no contention that exercise of the state's police power over the subject may not be committed to the state highway commission, and this was in fact done by c. 225, Laws 1929".

"Sec. 16 of the statute provides in effect that whenever a pipe line is constructed along, upon, or across any highway,

its location is subject to control by the highway commission. . . . With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, established and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission. . . . The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law".

If carried into effect, the challenged order of the Commission would result in taking private property for public use. *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 523, 524; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 194. A private right of way is an easement and is land. *United States* v. *Welch*, 217 U. S. 333, 339. No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the 14th Amendment. *C. B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226, 241; *C. B. & Q. Ry.* v. *Drainage Comm'rs*, 200 U. S. 561, 593; *McCoy* v. *Union Elevated Ry. Co.*, 247 U. S. 354, 363; *C. B. & Q. R. R. Co.* v. *Pub. Util. Comm.*, 69 Colo. 275, 279. See Lewis, Eminent Domain, (3rd Ed.). § 223.

A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. *Schelsinger* v. *Wisconsin*, 270 U. S. 230, 240; *Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508; *Southern Railway Co.* v. *Virginia, supra*, p. 196.

While the court below held that the Commission exercised police power to make public travel safe, and to accomplish that end might require alteration of the lines without compensation, it repudiated the suggestion that the same reasoning would support an order to remove other lawful structures, e. g. compressor stations. "Transmission lines of all kinds" it said, "are on the same footing with railroads with respect to grade crossings". *Erie R. R. Co.* v. *Pub. Util. Commissioners*, 254 U. S. 394 was cited and relied upon.

We cannot accept the view that under the Federal Constitution appellant's transmission lines are upon the same footing as railroads. The opinion below declared there was adequate distinction

between the two to justify different classification and treatment under the Act of 1929. And counsel for appellee very properly say: "A railroad grade crossing presents an entirely different problem for public regulation than does a pipeline buried beneath the highway. . . . The twenty-four inch high pressure natural gas transmission line of appellant when buried beneath the surface of such highways certainly is not a constant hazard to vehicular traffic".

The record fails to disclose that appellant's lines were the cause of serious danger to the public. Whatever of this, if any, would follow extensions of the highways across them is not comparable to the hazard incident to the operation of railroad trains. Like any other lawful structure these lines may have presented obstacles to construction of the proposed highways; but this might have been overcome by condemnation proceedings.

We are advised by counsel for the Commission that appellant's Delaware charter "contains no specific reference to any right to intersect or occupy any public highway, public land or waters". Also, that in Kansas "beyond the provisions of the statute, R. S. 1933 Supp., 68-415, [Sec. 16, c. 225, Acts of 1929] the validity of which is challenged in this case, there are absolutely no statutory obligations or regulations imposed upon pipeline companies with respect to the manner of the construction, maintenance or operation of their lines, whether located upon, along or across public highways or private lands".

Where the circumstances sufficed to show that the public would be subjected to serious danger from moving trains and supported the inference that the railroad company obtained permission to occupy the soil subject to reasonable legislation to prevent such danger, this Court has upheld orders, based upon the state's police power, to change tracks, eliminate grade crossings etc.

"The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. . . . The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and

persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety". *C. B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226, 250, 252.

"The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted". *Cincinnati, I. & W. R. Co.* v. *Connersville*, 218 U. S. 336, 343. *Cricago, M. & St. P. Ry.* v. *Minneapolis*, 232 U. S. 430, 440.

Erie Railroad Co. v. *Board of Public Util. Commissioners, supra*, opinion by Mr. Justice Holmes, goes upon the theory that it could be reasonably said that public safety required the changes, and that the order of the Commission "should be regarded as stating a condition that must be complied with if the company continues to use" the soil. Also, "the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires."

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, 413, 415-416, Mr. Justice Holmes again writing, elucidates the doctrine of the *Erie's* case.

"As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most, if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act".

Accordingly the court refused to sustain a Pennsylvania statute as an exercise of the police power which forbade the mining of anthracite coal under streets in such a way as to cause the subsidence of any structure used as a human habitation. "The rights of the public in a street, purchased or laid out by eminent domain

are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change".

The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public.

The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury. *N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S. 556.

New Orleans v. *Drainage Commission*, 197 U. S. 453, and similar cases concerning pipes in public streets are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality.

As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the State Highway Commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution.

The questioned judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.